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Supreme Court of the United States

OCTOBER TERM, 1950

No. 96

CANTON RAILROAD COMPANY, APPELLANT,

vs.

JOSEPH L. A. ROGAN, OWEN E. HITCHENS AND WILLIAM W. TRAVERS, CONSTITUTING STATE TAX COMMISSION OF MARYLAND

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF MARYLAND

FILED MAY 29, 1950.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

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[fol. 1]

IN THE COURT OF APPEALS OF MARYLAND
OCTOBER TERM, 1949

No. 96

CANTON RAILROAD COMPANY

v.

JOSEPH H. A. ROGAN, OWEN E. HITCHENS and WILLIAM W. TRAVERS, Constituting the State Tax Commission of Maryland

PETITION FOR ALLOWANCE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

To the Honorable, Ogle Marbury, Chief Judge of the Court of Appeals of Maryland:

The Appellant, Canton Railroad Company, by its attorneys John Henry Lewin and Venable, Baetjer and Howard, alleges:

1. On April 19, 1950, the Court of Appeals of Maryland, being the highest court of the State of Maryland in which a decision in this case could be had, filed its opinion in this case and entered a decree against your Petitioner affirming the decree of the Circuit Court No. 2 of Baltimore City, which sustained a decision of the State Tax Commission of Maryland. This decree is final. On May 19, 1950, the time expired within which any petition for reargument could be filed, and the mandate of the Court of Appeals of Maryland issued to the said lower court.

[fol. 2] 2. Your Petitioner is a corporation of the State of Maryland engaged in the business of operating a railroad and marine terminal in said state, and a substantial part of its business consists of handling, transporting and forwarding in foreign commerce imports and exports, in return of which services it derives revenues or gross receipts. A statute of the State of Maryland, to wit, Article 81, Secs. 94½ and 95 of the Maryland Code (1943 Supp.) and Secs. 96-100 inclusive of the Maryland Code (1939 Edition) purports to, and has been construed and applied to, lay,

and exact from your Petitioner, an annual State franchise or privilege tax upon, and in return for, the right of your Petitioner to engage in such foreign commerce and in such importing and exporting process, measured by the gross receipts derived in the preceding calendar year by your Petitioner from the rendition of its services in handling, transporting and forwarding imports and exports.

3. In this case, in the proceedings before the State Tax Commission of Maryland, the lower court and this Court leading up to the entry of the final decree of the Court of Appeals of Maryland mentioned in paragraph 1 hereof, the validity of said statute of the State Maryland, as so construed and applied in the year 1947, was drawn in question on the ground of its being repugnant to the Constitution of the United States and in particular to Article 1, Section 10, Clause 2 thereof known as the Import-Export [fol. 3] Clause; and the decision of the Court of Appeals of Maryland in this case, embodied in its said final decree, was in favor of the validity of said statute.

4. Your Petitioner has filed with this petition with the Clerk of the Court of Appeals of Maryland an assignment of errors, setting out separately and particularly each error which your Petitioner asserts was made by the Court of Appeals of Maryland in this case and in its said decision and final decree, and also presents herewith a separate typewritten statement particularly disclosing the basis upon which your Petitioner contends that the Supreme Court of the United States has jurisdiction upon appeal to review the said final decree of the Court of Appeals of Maryland in question.

Wherefore, your Petitioner prays the allowance of an appeal from said final decree of the Court of Appeals of Maryland to the Supreme Court of the United States, to the end that the Supreme Court of the United States may review the record in this case and said final decree, and correct the said errors assigned and complained of by your Petitioner, and reverse the said final decree.

John Henry Lewin, Venable, Baetjer & Howard,
Attorneys for Petitioner.

[fol. 4] IN THE COURT OF APPEALS OF MARYLAND

[Title omitted]

ORDER ALLOWING APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Canton Railroad Company, the Appellant in this case, by its attorneys, having this day duly petitioned the Chief Judge of the Court of Appeals of Maryland for the allowance of an appeal to the Supreme Court of the United States from the final decree of the Court of Appeals of Maryland in this case entered April 19, 1950, (the time for filing a motion for reargument in this case having expired and the mandate of the Court of Appeals of Maryland having issued to the lower court on May 19, 1950), and having at the same time duly presented, and filed with the Clerk of this Court, its Petition for Allowance of Appeal, Assignment of Errors and Jurisdictional Statement, pursuant to statute and to the rules of the Supreme Court of the United States in such cases made and provided, and the said Appellant having given and filed, as security for costs of said appeal, a surety bond in the principal amount of Five Hundred [fol. 5] Dollars, which bond has this day been approved by the Chief Judge of the Court of Appeals of Maryland, it is this 24th day of May, 1950, by the Chief Judge of the Court of Appeals of Maryland,

Ordered that an appeal as provided by law be, and the same hereby is, allowed to the Supreme Court of the United States from the said final decree of the Court of Appeals of Maryland, and it is further ordered that the Clerk of the Court of Appeals of Maryland shall prepare and certify a transcript of the record, proceedings and final decree in this case and transmit the same to the Clerk of the Supreme Court of the United States.

Ogle Marbury, Chief Judge of the Court of Appeals of Maryland.

[fols. 6-8] Bond on appeal for $500.00 approved May 24, 1950, omitted in printing.

[fols. 9-10] Citation in usual form showing service on Hall Hammond, et al. omitted in printing.

[fol. 11] IN THE COURT OF APPEALS OF MARYLAND

[Title omitted]

ASSIGNMENT OF ERRORS

Canton Railroad Company hereby assigns the following errors in the record, decision and final decree of the Court of Appeals of Maryland in this case, on the basis of which it will pray the Supreme Court of the United States, on appeal, to reverse the said final decree of the Court of Appeals of Maryland:

1

The Court of Appeals of Maryland erred in deciding and decreeing that the statute of the State of Maryland, Article 81, Sections 94½ and 95 of the Maryland Code (1943 Supp.), construed and applied to impose a state franchise or privilege tax upon Canton Railroad Company's franchise or privilege "to operate a railroad", and to impose a part of said tax upon its privilege to engage in the business of handling, transporting and forwarding imports and exports in transit, is valid and not repugnant to Article 1, Section 10, Clause 2 of the Constitution of the United States (Import-Export Clause), insofar as said statute [fol. 12] imposes such tax upon Canton Railroad Company's privilege to engage in the importing and exporting process, (i.e. the business of handling, transporting and forwarding imports and exports in transit), and measures this tax by Canton Railroad Company's gross receipts from such business.

2

The Court of Appeals of Maryland erred in deciding and decreeing that the statute of the State of Maryland, Article 81, Sections 94½ and 95 of the Maryland Code (1943 Supp.), construed and applied to impose a state franchise or privilege tax upon the Canton Railroad Company's franchise or privilege "to operate a railroad", and to impose a part of said tax upon its privilege to engage in foreign commerce (i.e. handling, transporting and forwarding imports and exports in transit), is valid and not repugnant to Article 1, Section 8, Clause 3 of the Constitution of the United States (Commerce Clause), insofar as said statute imposes such tax upon Canton Railroad Company's privilege to engage

in foreign commerce, (i.e. the business of handling, transporting and forwarding imports and exports in transit), and measures this tax by Canton Railroad Company's gross receipts from such business.

3

The Court of Appeals of Maryland erred in deciding and decreeing that the statute of the State of Maryland, Article 81, Sections 94½ and 95 of the Maryland Code (1943 Supp.), insofar as it is construed and applied to impose a state franchise or privilege tax upon Canton Railroad [fol. 13] Company's privilege to engage in the business of handling, transporting and forwarding imports and exports in transit, measured by its gross receipts derived from such business, is valid and not repugnant to Article 1, Section 10, Clause 2 of the Constitution of the United States (Import-Export Clause), because it was imposed by the State of Maryland as an "in lieu franchise tax" in the place and stead of certain State ad valorem property taxes.

4

The Court of Appeals of Maryland erred in deciding and decreeing that the statute of the State of Maryland, Article 81 Sections 94½ and 95 of the Maryland Code (1943 Supp.), insofar as it is construed and applied to impose a state franchise or privilege tax upon Canton Railroad Company's privilege to engage in foreign commerce (i.e. the business of handling, transporting and forwarding imports and exports in transit), measured by its gross receipts derived from such business, is valid and not repugnant to Article 1, Section 8, Clause 3 of the Constitution of the United States (Commerce Clause), because it was imposed by the State of Maryland as an "in lieu franchise tax" in the place and stead of certain State ad valorem property taxes.

5

The Court of Appeals of Maryland erred in deciding and decreeing that, because the State of Maryland might validly and constitutionally impose certain non-discriminatory ad valorem property taxes upon the property of the Canton Railroad Company, it may, notwithstanding the provisions of Article 1, Section 10, Clause 2 of the Constitution [fol. 14] of the United States (Import-Export Clause),

validly and constitutionally impose, in lieu of such state ad valorem property taxes, and in the place and stead thereof, a state franchise or privilege tax upon Canton Railroad Company's privilege to engage in the importing and exporting process, (i.e. the business of handling, transporting and forwarding imports and exports in transit), and measure this tax by Canton Railroad Company's gross receipts from such business.

6

The Court of Appeals of Maryland erred in deciding and decreeing that, because the State of Maryland might validly and constitutionally impose certain non-discriminatory ad valorem property taxes upon the property of Canton Railroad Company, it may, notwithstanding the provisions of Article 1, Section 8, Clause 3 of the Constitution of the United States (Commerce Clause), validly and constitutionally impose, in lieu of such state ad valorem property taxes, and in the place and stead thereof, a state franchise or privilege tax upon Canton Railroad Company's privilege to engage in foreign commerce, (i.e. the business of handling, transporting and forwarding imports and exports in transit), and measure this tax by Canton Railroad Company's gross receipts from such business.

7

The Court of Appeals of Maryland erred in deciding and decreeing that a state "in lieu franchise tax", imposed by Article 81, Sections 94½ and 95 of Maryland Code (1943 [fol. 15] Supp.) upon Canton Railroad Company's privilege of engaging in foreign commerce and in the importing and exporting process (i.e. the business of handling, transporting and forwarding imports and exports in transit) is a constitutionally valid substitute for a non-discriminatory and valorem property tax which might validly and constitutionally be imposed upon the property of the Canton Railroad Company.

8

The Court of Appeals of Maryland erred in deciding and decreeing that, although Article 1, Section 10, Clause 2 of the Constitution of the United States (Import-Export Clause) forbids the imposition by the State of Maryland of "any" state tax upon the importing and exporting process,

and Article 1, Section 8, Clause 3 of the Constitution of the United States (Commerce Clause) forbids the imposition of any state tax which constitutes a discrimination against, or an unreasonable and undue burden upon, foreign commerce, and the Fourteenth Amendment of the Constitution of the United States forbids the deprivation of property without due process of law, and, although Canton Railroad Company is engaged in such importing and exporting process and in such foreign commerce, nevertheless the State of Maryland might, if it chose to do so, validly discriminate against such importing and exporting process and such foreign commerce, and against the property used therein, by levying upon the value of Canton Railroad Company's property used in such process, a state property tax at a rate over ten times greater than the rate of such property [fol. 16] taxes levied by the State upon the value of the property of all other taxpayers in the State of Maryland except those owning and operating railroads.

9

The Court of Appeals of Maryland erred in deciding and decreeing that the State of Maryland might, notwithstanding the Constitution of the United States, validly impose upon the value of the property of Canton Railroad Company used by it in the importing and exporting process and in foreign commerce a state property tax at a rate over ten times greater than the rate of such property taxes levied by the State of Maryland upon the value of the property of all other taxpayers in the State of Maryland except those owning and operating railroads; and then, upon this erroneous and unconstitutional premise, further erred in deciding and decreeing that therefore the State of Maryland may validly, in lieu of such discriminatory property tax, impose upon the Canton Railroad Company's privilege of engaging in the importing and exporting process and in foreign commerce a state franchise or privilege tax of the same magnitude.

10

The Court of Appeals of Maryland erred in deciding and decreeing that, because the State of Maryland might validly and constitutionally impose an ordinary non-discriminatory state ad valorem property tax upon the property of the Canton Railroad Company, it may, notwithstanding the

provisions of the Import-Export Clause and the Commerce [fol. 17] Clause of the Constitution of the United States, validly impose, by Article 81, Sections 94½ and 95 of the Maryland Code (1943 Supp.), in lieu of such property tax, or in the place and stead thereof, a state franchise or privilege tax upon Canton Railroad Company's privilege to engage in the importing and exporting process (i. e. the business of handling, transporting and forwarding imports and exports in transit), measured by Canton Railroad Company's gross receipts from such business, although the amount of said franchise or privilege tax is over ten times greater than a reasonable and just equivalent of such ordinary non-discriminatory state ad valorem property tax.

11

The Court of Appeals of Maryland erred in deciding and decreeing that a state "in lieu franchise tax", imposed by Article 81, Sections 94½ and 95 of the Maryland Code (1943 Supp.) upon Canton Railroad Company's privilege of engaging in foreign commerce and in the importing and exporting process (i. e. the business of handling, transporting and forwarding imports and exports in transit), which "in lieu franchise tax" is over ten times greater than an ordinary non-discriminatory state ad valorem property tax which might have been validly imposed by the State of Maryland upon the property of Canton Railroad Company, is a constitutionally valid substitute for such an ordinary non-discriminatory ad valorem property tax upon the property of the Canton Railroad Company.

[fol. 18]

12

The Court of Appeals of Maryland erred in deciding and decreeing that the decisions of the Supreme Court of the United States in the cases of *Maine* v. *Grand Trunk Railway*, 142 U. S. 217, *U. S. Express Co.* v. *Minnesota*, 223 U. S. 335, *Cudahy Packing Co.* v. *Minnesota*, 246 U. S. 450, *Northwestern Life Insurance Co.* v. *Wisconsin*, 247 U. S. 132, *Great Northern Railway Co.* v. *Minnesota*, 278 U. S. 503 and *Illinois Central Railroad Co.* v. *Minnesota*, 309 U. S. 157, held valid, under Article 1, Section 8, Clause 3 of the Constitution of the United States (Commerce Clause), "in lieu franchise taxes" imposed upon the privilege of engaging in

interstate commerce as valid substitutes for constitutionally valid ad valorem property taxes.

This is error, because the Minnesota state in lieu taxes held valid in the *U. S. Express Co.*, *Cudahy Packing Co.*, *Great Northern Railway Co.* and *Illinois Central Railway Co.* cases were themselves property taxes and not "in lieu franchise taxes"; because the Pennsylvania state tax held valid in *Maine* v. *Grand Trunk Railroad Co.* was construed to be a property tax in *Galveston, Harrisburg and San Antonio Railroad Co.* v. *Texas*, 210 U. S. 217; and because the "in lieu franchise tax" held valid in *Northwestern Life Insurance Co.* v. *Wisconsin* was imposed upon the privilege of engaging in the insurance business which was not then interstate commerce (Cf. *Paul* v. *Virginia*, 8 Wall. 168 with *U. S.* v. *Southeastern Underwriters Assn.*, 322 U. S. 533). Furthermore, unlike the in lieu franchise or privilege tax imposed upon Canton Railroad Company in the case at [fol. 19] bar, which is over ten times greater than ordinary state ad valorem property taxes, all of the state taxes held valid in these cases were no more than a reasonable and just equivalent of ordinary state ad valorem property taxes.

13

The Court of Appeals of Maryland erred in deciding and decreeing that "the tax here in question is not a direct tax on imports or exports like that of a State stamp tax upon bills of lading for the export of gold and silver; or a federal stamp tax on an export bill of lading for wheat exported * * *; or a federal stamp tax on charter parties exclusively for the carriage of cargoes from State ports to foreign countries; or a tax applied against contracts of marine insurance, which were held to be an integral part of exports."

This is error, because the invalid stamp taxes with which the Court of Appeals of Maryland in this holding attempts to contrast the franchise or privilege tax assailed in the case at bar were not property taxes imposed upon the exports themselves; on the contrary these stamp taxes were all excise or privilege taxes upon integral parts of exportation and, to that all-important extent, are closely similar to the Maryland state franchise tax upon importation and exportation here in question. The only differences between these invalid stamp taxes and the Maryland state franchise tax in question are that the latter (1) is imposed by a state and

[fol. 20] not by the federal government, (2) is a tax upon exportation itself, which is more inclusive than the integral parts of exportation, and (3) is a tax upon importation as well.

14

The Court of Appeals of Maryland erred in deciding and decreeing that the state franchise or privilege tax imposed by Article 81, Sections 94½ and 95 of the Maryland Code (1943 Supp.) upon Canton Railroad Company's privilege of engaging in the importing and exporting process (i. e. handling, transporting and forwarding exports and imports in transit) "is certainly not comparable under the Import-Export Clause to" the stamp tax or excise laid upon the privilege of entering into a contract of insurance insuring a cargo of exports held invalid in *Thames and Mersey Insurance Company* v. *U. S.*, 237 U. S. 19, or the sales tax levied expressly "for the privilege of selling" exported gasoline held invalid in *Richfield Oil Corp.* v. *State Board of Equalization*, 329 U. S. 69.

15

The Court of Appeals of Maryland erred in deciding and decreeing that the California state tax held invalid in *Richfield Oil Corp.* v. *State Board of Equalization*, 329 U. S. 69, as repugnant to Article 1, Section 10, Clause 2 of the Constitution of the United States (Import-Export Clause), was "a direct tax upon an export".

[fol. 21] This is error, because, on the contrary, said tax was retail sales tax levied expressly "for the privilege of selling tangible personal property at retail" including exported gasoline.

16

The Court of Appeals of Maryland erred in deciding and decreeing that Article 1, Section 10, Clause 2 of the Constitution of the United States (Import-Export Clause) should not "be given a more prohibitive effect" upon state taxes than Article 1, Section 8, Clause 3 of the Constitution of the United States (Commerce Clause).

This is error, because the Import-Export Clause forbids "any" tax upon importation and exportation, whereas the Commerce Clause has been construed and applied to have a more limited effect and to forbid only certain state taxes upon interstate and foreign commerce.

17

The Court of Appeals of Maryland erred in deciding and decreeing that there is "no reason why a franchise tax measured by gross receipts, including receipts from foreign commerce, should be valid under one clause (Commerce Clause) and not under the other (Import-Export Clause), particularly where the tax is in lieu of other permitted taxes".

John Henry Lewin, Venable, Baetjer & Howard, Attorneys for Appellant, Canton Railroad Company.

[fols. 22-43] In the Court of Appeals of Maryland

[Title omitted]

Appeal from the Circuit Court No. 2 of Baltimore City

Appendix to Appellant's Brief—Filed October 13, 1949

[fol. 44] In Circuit Court No. 2 of Baltimore City

Decree

This case coming on for hearing; counsel for the respective parties having been heard; briefs having been filed; and the proceedings having been read and considered; it is this 29th day of June, 1949, by the Circuit Court No. 2 of Baltimore City

Adjudged and Decreed

That the decision of the State Tax Commission of Maryland to include in the measurement of the Petitioner's Gross Receipts Tax for the year 1947, receipts derived from the transportation of goods consigned for importation or destined for exportation, be and the same is hereby sustained.

Joseph Sherbow.

IN THE CIRCUIT COURT NO. 2 OF BALTIMORE CITY

OPINION—Filed June 24, 1949

These appeals by the Western Maryland Railway Company and the Canton Railroad Company are based upon the contention set up by the taxpayers that the gross receipts tax assessed under the provisions of Code, Article 81, Sections 94½ to 99 (1943 Supplement), inclusive, are unconstitutional and invalid as applied to the operating revenues of the railroads derived from their import and export business.

This Code provision requires railroads and certain other public utilities to pay an annual tax "as a franchise tax * * * measured by the gross receipts for the preceding calendar year. * * * " Taxable gross receipts are limited to operating revenues derived from business in this State. The tax has been in effect since 1872, but has never been directly passed upon by the Supreme Court of the [fol. 45] United States. Our Court of Appeals has held that this tax does not violate the Commerce Clause of the Federal Constitution. (Railroads vs. State, 92 Md. 668, 1901.)

Now for the first time the question is raised as to whether the Import-Export Clause of the Constitution of the United States prevents the State of Maryland from levying this tax on the gross receipts earned by railroads in this State from transportation of exported and imported goods.

The amount of taxes involved in this controversy is considerable and will be high as long as export traffic remains at its present level. The methods of calculation are not before the court, although it is apparent the actual determination of export-import traffic is difficult, but not impossible, of ascertainment as the railroads keep complete detailed records of shipments.

The railroads filed their returns to the State Tax Commission in due course, but after several recent decisions of the U. S. Supreme Court they filed amended returns seeking to eliminate the gross receipts earned from the transportation of exported coal, grain and miscellaneous commodities, and of imported ores and other freight. The claim is based upon the Export-Import Clause, Article 1, Section 10, Clause 2, of the Constitution of the United States, the taxpayers asserting this clause prohibited such State taxation.

After lenghty hearings the State Tax Commission held the tax was not prohibited by this constitutional provision and these appeals followed.

The Export-Import Clause of the Constitution, Article I, Section 10, Clause 2, is as follows:

> "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws; and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the [fol. 46] Revision and Control of the Congress."

This section of the Constitution is broad and all inclusive with only one exception not relevant here. It prohibits the State from levying any tax on exports or imports and from deriving any revenue from this source. This clause represented a compromise in the Constitutional Convention between those advocating local and those advocating national sovereignty. Its purpose was to end the strife that had characterized the Confederation. Southern States felt they would bear the brunt of imposts on imports if left to individual States for determination, while exporting States felt they would be at a tradin, disadvantage if other States taxed their products flowing through these States to foreign markets. By Article I, Section 9, of the Constitution, even Congress was placed under a disability to tax exports for fear of discrimination. Congress was given the power to regulate interstate and foreign commerce, but the power to tax exports was taken from the States to prevent coastal States from taxing goods produced inland and sold abroad. (The Federalist, No. 42; Elliot's Debates, 252, 483; 14 U. of C. Law Review, 672.)

Over the years various cases came to the Supreme Court for determination as to whether the different taxes imposed from time to time violated this provision of the Constitution.

These cases range all the way from taxes on foreign bills of lading to taxes upon baseball equipment for foreign shipment. These cases are collected in various law review articles, where they are summarized, and are not repeated here. (See 14 University of Chicago Law Review, 669;

42 Illinois Law Review, 251; 59 Harvard Law Review, 627; 60 Harvard Law Review, 501 and 710.)

Then came the cases of Richfield Oil Corporation vs. State Board of Equalization (1946), 329 U. S. 69, and a short time later Joseph vs. Carter and Weeks Stevedoring Co. (1947), 330 U. S. 422.

[fol. 47] The Richfield Oil case involved the validity of the California Retail Sales Tax as applied to the sale of oil for export. Under the California Law it was the duty of the vendor, Richfield Oil, to collect the tax from the vendee. In this instance the purchaser was the New Zealand Government. The oil was carried by pipe line from the refinery to storage tanks at the harbor, and then pumped into the hold of the steamer for shipment abroad.

The Supreme Court held that the Import-Export Clause prohibited the imposition of this State tax on this sale, with the opinion by Mr. Justice Douglas, six Justices concurring, and Mr. Justice Black dissenting. The opinion discusses the Import-Export Clause at some length and pointed out that "any" tax, whether discriminatory or not, is prohibited by the Export-Import Clause. There are no qualifications, and only one minor exception.

In applying this provision of the Constitution to the facts in that case the Supreme Court found that when the oil was delivered into the hold of the vessel "that delivery marked the commencement of the movement of the oil abroad." The process of exporting within the meaning of the Constitution began when the goods actually started their movement in foreign commerce, and then the immunity attaches.

The Joseph case, supra, involved the validity of the New York City gross receipts tax as applied to gross receipts derived from stevedoring. By a five to four decision the Supreme Court held the tax invalid under the commerce clause, but Mr. Justice Douglas (who wrotes the opinion in the Richfield case) dissented, taking the view that the tax did not violate the commerce clause but did violate the Import-Export Clause. The majority did not base their decision on the Import-Export Clause of the Constitution.

In the case of Joy Oil Co. vs. State Tax Commission, decided June 13, 1949, by the Supreme Court, 17 U. S. Law Week, 4508, Mr. Justice Frankfurter, speaking for the majority of the Court, held that a million and a half

[fol. 48] gallons of gasoline, marked for export, but held in Michigan for fifteen months awaiting adequate transportation facilities, was subject to an *ad valorem* property tax assessed by the City of Dearborn. The Court said, it was not enough "that by the rail shipment to Detroit one step in the process of exportation had been taken * * *. The Export-Import Clause was meant to confer immunity from local taxation upon property being exported, not to relieve property eventually to be exported from its share of the cost of local services."

While it is true the Supreme Court, in Mr. Justice Douglas' opinion in Empresa Siderurgica, S. A. vs. County of Merced, decided May 31, 1949, 17 U. S. Law Week, 4431, held that "the tax immunity runs to the process of exportation and the transactions and documents embraced in it," it is equally true the Court was again passing on the direct tax on the article itself.

The taxpayers urge that Hooven & Allison vs. Evatt, 324 U. S. 652 (1945) is authority for holding that the importing process continues through the rail journey to an inland destination. The Court there held that the hemp in Ohio, ready for use in manufacture, still in its unbroken package, remained an import after the railroad journey was over. Again the Court was dealing with a tax on the article itself.

It is thus seen that the question presented in the Richfield Oil case, Joy Oil Co. case, the Empresa Siderurgica, case and the Hooven and Allison case, involved a tax on the articles themselves because those articles had obtained or retained the characteristics of exports or imports. But that is not the question in this case. Here the issue is whether the Maryland Gross Receipts Tax, as applied to the railroads involved, is a tax on the activity or process of exporting and importing.

In Crew-Levick Co. vs. Pennsylvania, 245 U. S. 292 (1917), the Supreme Court held invalid a gross receipts tax levied against a taxpayer who was actually selling exports. That case established the rule that a gross receipts tax imposed upon the business of selling goods in foreign commerce was, in effect, "a regulation of foreign commerce of [fol. 49] an impost upon exports, within the meaning of the pertinent clauses of the Federal Constitution." But the Crew-Levick case did not decide that every non-discriminatory gross receipts tax imposed upon, or which might influ-

ence, the export business was invalid, nor did it define, for all purposes, the scope of activities which might be embraced within the concept of the "export business."

It seems obvious that the railroads here involved are not engaged in the exporting or importing business. These carriers do not control the shipments of the products other than to bring them, in certain cases, to the water's edge. Here, unlike the taxpayer in the Crew-Levick case, the railroads are not concerned directly with foreign markets and foreign buyers. While it may be true that the railroads, in part, make possible that other persons may engage in the export-import business, such assistance does not convert the carriers into exporters or importers themselves.

Taking the contention of the railroads in its most favorable light, therefore, it can be seen that they seek to have held invalid the Maryland Gross Receipts Tax because it is imposed not upon the business or process of importing and exporting but upon an activity which merely assists other persons to engage in that business. No Supreme Court case has gone this far, and, in my opinion, the contention is without merit.

The Court holds that the Maryland Gross Receipts Tax is too remote and indirect to be affected by the Export-Import Clause. Goods are in transit on these railroads at all times, but are not in the process of exportation until delivered to the ultimate carrier for shipment abroad. The State tax is not a tax on exports or imports or on the business or process of exporting or importing, but is a tax on the privilege of operating a railroad in the State of Maryland, and is in lieu of certain other taxes. (See State Tax Commission vs. Western Md. Ry., 52 A. 2d, 615.) The tax is not levied on the goods exported or imported, or the proceeds, or the privilege of exporting or importing.

[fol. 50] All transportation in some manner affects to some degree exports and imports. The real question is, how much and how direct, and whether there is a close and substantial relationship to exports and imports as to come within the prohibition of the Constitution.

There must at some point be a distinction between the direct and indirect effects of any tax. We must determine what its limit is and what its practical application amounts to.

This clause does not reach all enterprises and transactions which have a remote and indirect effect on exports and

imports, otherwise it would embrace every kind of tax. The income tax paid by a railroad in some measure affects exports and imports and is based in some degree on the profits from such traffic. Other taxes paid by railroads of necessity affects exports and imports, but such affect is indirect and remote.

These railroads do not engage in foreign commerce, nor do they control the shipments of the products other than to bring them to other carriers for export or to receive them from other carriers for further transportation inland. To hold that they are engaged in exporting and importing because the merchandise is ultimately actually shipped abroad or received from foreign countries is another way of saying that that which was indirect has become direct.

It appears to me that the Maryland tax is not on the business of importing or exporting and is so remote insofar as its affect on exports and imports or the process of exporting or importing as not to be in contravention of the constitutional clause already mentioned.

The decision of the State Tax Commission in each case is sustained.

Joseph Sherbow, Judge.

[fol. 51] STATEMENT OF THE CASE UNDER RULE 22

Pursuant to, and in conformity with, Rule 22 of the Rules and Regulations Respecting Appeals made and prescribed by the Court of Appeals of Maryland, the parties to this case, with the approval of the Circuit Court No. 2 of Baltimore City, have prepared and signed this Statement of the Case showing how the questions in this case arose and were decided:

1. Canton Railroad Company, hereinafter referred to as "Canton," is a railroad corporation incorporated under and by virtue of the laws of the State of Maryland with its place of business in Baltimore, Maryland. It is engaged in Maryland in the business of a common carrier and handler of freight only, and all of its piers, track and other railroad properties and facilities are located in the City of Baltimore, Maryland, and in Baltimore County where all of its business is conducted.

2. Pursuant to Maryland Code, Article 81, Section 96, Canton duly and timely filed in 1947 with the State Tax Commission of Maryland, hereinafter referred to as "Commission," its Report under oath, showing, as derived from its railroad business done in the State of Maryland during the year ended December 31, 1946, total gross receipts or operating revenues of $1,588,774.48 and claiming thereon that certain of said receipts and operating revenues were exempt from taxation under Maryland Code, Article 81, Section 95, because they were derived from Canton's operations in foreign commerce; and thereafter, in June, 1947, Canton duly filed with the Commission, which was received by the Commission as part of Canton's original Report, a verified Supplemental Report for the year ended December 31, 1946, which reported that, of its said total gross receipts or operating revenues, its gross receipts or operating revenues derived from its export and import operations in foreign commerce were as follows:

[fol. 52]

I. C. C. Accounts	Operating Revenues from Foreign Commerce
110 Switching	$565,713.30
135 Storage-Freight	62,663.63
143 Crane Privilege	57,122.24
143 Wharfage	17,348.09
143 Weighing	3,109.95
Total	$705,957.21

In its letter to the Commission dated June 26, 1947, transmitting the said Supplemental Report, Canton claimed that the Maryland statute, Maryland Code Article 81, Section 95, imposing the gross receipts tax could not, under the Import-Export Clause of the Constitution of the United States, Article I. Section 10, Clause 2, be constitutionally applied to its said gross receipts derived from Canton's services in foreign commerce.

3. By letter to the Commission dated September 16, 1947, the attorney for Canton claimed that the said Maryland Statute imposing the gross receipts tax could not, under the said Import-Export Clause of the Constitution of the United States, be constitutionally applied to Canton's said

gross receipts or operating revenues from its export and import business and operations and referred the Commission to certain court decisions and other authorities.

4. By written notice dated December 18, 1947, the Commission notified Canton that a tentative assessment under Maryland Code Article 81, Section 95, amounting to $1,588,774.48 had been entered by the Commission against Canton, and that $1,588,774.48 was the amount of gross receipts in 1946 upon which the Commission had tentatively computed and imposed upon Canton a gross receipts tax for the year 1947 in the amount of $39,092.34, and that the said tentative assessment would become final and conclusive unless written application for a change therein should [fol. 53] be presented to the Commission within fifteen (15) days from the date of said notice.

5. By its letter to the Commission dated December 31, 1947, Canton duly applied to the Commission for a reduction of the said tentative assessment in an amount equal to its gross receipts and operating revenues derived from its import and export business and operations in foreign commerce, as disclosed separately by its said Supplemental Report. The exemption of such gross receipts and operating revenues would, if recognized, have reduced the said assessment by $705,957.21 to an assessment of $582,817.27 and the said proposed gross receipts tax by $17,648.34 to a tax of $21,444.00. In said letter Canton again claimed that the tentative assessment, insofar as it included such gross receipts and operating revenues, and that a gross receipts tax calculated on an assessment which included such gross receipts and operating revenues, would contravene the said Import-Export Clause of the Constitution of the United States.

6. On February 4, 1948, and February 26, 1948, a formal hearing on Canton's said protest and application for a change and reduction in said tentative assessment was held by and before the Commission, at which hearing Canton appeared and was represented by counsel. At said hearing all of the documents heretofore mentioned were offered and received in evidence and oral testimony and evidence was given by two witnesses on behalf of Canton as hereinafter set forth. No other testimony was offered by any party to the proceedings.

Melvin A. Myers, an experienced railroad accountant and Traffic Manager of Canton in charge of traffic, tariffs, rates, etc., and agents accounts, was duly sworn and testified that he had accurately prepared the said Report and Supplemental Report described in paragraph 2 hereof from accurate original records of Canton currently kept by it in the ordinary course of its business (which original records were then exhibited to the Commission); that he had direct supervision over the operations of Canton in 1946 [fol. 54] from which were derived the gross receipts or operating revenues set forth on the said Supplemental Report from Switching or transportation on Canton's line; that all of the gross receipts or operating revenues totaling $705,957.21 set forth by items on the said Supplemental Report as Operating Revenues From Foreign Commerce were derived from Canton's export and import business and operations in return for Canton's services in handling shipments then known by Canton to be then in actual transit to and from foreign countries; and that the principal commodities so handled by Canton in 1946 were ores, wood pulp and sugar, said three commodities being the subject of over ninety per cent of Canton's said import business.

Milton Shreck, Vice-President of Canton, was duly sworn and testified that he had held that office during 1946 and had direct supervision over the operations of Canton in 1946 from which were derived the gross receipts or operating revenues set forth in said Supplemental Report from the items Storage, Crane Privilege, Wharfage and Weighing. Canton pays ad valorem property taxes to local county and city governments only, being exempt by statute from the payment of such taxes to the State of Maryland. Canton also pays the State of Maryland a tax upon its net income in the calculation of which its operating revenues subject to the gross receipts tax less related expenses are excluded. This witness testified to the accuracy and correctness of the facts appearing upon the said Supplemental Report. He identified and verified an exhibit, which he had prepared, showing for each of four years, 1944 to 1947, inclusive, a comparison of the gross receipts taxes sought to be imposed on Canton and such taxes computed after eliminating from the assessments and tentative assessment the gross receipts or operating revenues claimed by Canton to be exempt by reason of the Import-Export

Clause with what a Maryland State Ad Valorem Property Tax would be for each of said years if computed at the current rate upon the assessed value of the properties of Canton and showing the ad valorem property tax rate which [fol. 55] would be needed to make such property taxes for each said year equivalent to the said gross receipts taxes. Said exhibit entitled "Canton Railroad Company—Comparison of Gross Receipts Taxes to State Ad Valorem Taxes" was offered and received in evidence and marked "Canton Railroad Company Exhibit No. 1". It is as follows:

EXHIBIT No. 1

Canton Railroad Company

Comparison of Gross Receipts Taxes to State Ad Valorem Taxes

	State Property Taxes			Gross Receipts Taxes		
Year	Assessed Value	Ad Valorem Rate	Amount	Amount of Tax (c)	Equivalent Ad Valorem Rate	Ratio of Col. (5) to Col. (2)
	(1)	(2)	(3)	(4)	(5)	(6)
1944.....	$3,791,550	.12	$4,550	(a) $60,093	$1.58	13.2
				(b) 33,280	.88	7.3
1945.....	3,850,000	.12	4,620	(a) 58,609	1.52	12.7
				(b) 30,258	.79	6.6
1946.....	3,800,000	.10	3,800	(a) 48,772	1.28	12.8
				(b) 21,237	.56	5.6
1947.....	3,800,000	.10	3,800	(a) 39,092	1.03	10.3
				(b) 21,444	.56	5.6

Notes:
(a) Based on Bax Commission Assessment.
(b) Amount of taxes with earnings from import-export traffic excluded.
(c) Measured by gross receipts for preceding calendar year.

* * * * * * *

This witness also identified and verified an exhibit which he had prepared, showing a breakdown of property tax assessments as between land and properties other than land made by the Commission on the properties of Canton for each of the four years, 1944 to 1947, inclusive. Said exhibit entitled "Canton Railroad Company—Breakdown of Property Tax Assessment" was offered and received in evidence marked "Canton Railroad Company Exhibit No. 2". It is as follows:

[fol. 56] EXHIBIT No. 2

Canton Railroad Company

Breakdown of Property Tax Assessment

Year	Land	Other Than Land	Total
1944	$1,946,900	$1,844,650	$3,791,550
1945	1,953,750	1,896,250	3,850,000
1946	1,955,890	1,844,110	3,800,000
1947	1,955,890	1,844,110	3,800,000

* * * * * * *

This witness testified, from said Exhibits Nos. 1 and 2, that a State Property Ad Valorem tax rate 20.1 times the prevailing Ad Valorem rate would have to be imposed upon Canton's properties other than land in order to derive a property tax equal to the gross receipts tax for 1947 sought to be imposed by the Commission and ten and one-half times the prevailing Ad Valorem rate in order to derive a property tax equal to the gross receipts tax for the year 1947 calculated after eliminating from the tentative assessment for 1947 the gross receipts or operating revenues derived in 1946 and claimed by Canton to be exempt by reason of the Import-Export Clause.

This witness also testified that of Canton's gross receipts or operating revenues had been included as gross income in the computation of Canton's Maryland State Income Taxes for 1947, its said State Income Taxes for 1947 based on its net income derived in 1946, would have amounted to approximately $6,155.00.

The Chairman of the Commission, who presided at said hearing, stated:

> "The Commission feels satisfied with the figures and the manner in which they were arrived at.
>
> * * * * * * *
>
> "Now, the Commission accepts, as it usually does the breakdown of the figures by the officers of the Canton Railroad Company."

[fol. 57] 7. Typical of the switching, storage of freight, crane privilege, weighing and wharfage services rendered

by Canton in 1946, in return for which it derived the gross receipts or operating revenues shown in its said Supplemental Report, from its import and export business, are the following services actually rendered by Canton in connection with the following specific 1946 shipments:

Import No. 1

In July of 1946, 1481 bales of woodpulp, weight 633,412 pounds, consigned by Borregaard & Company, importers to E. I. DuPont DeNemours & Company, Richmond, Virginia, were shipped from Sweden aboard the S. S. Kanangoora.

On July 9, 1946 the S. S. Kanangoora docked at a pier of Canton at Baltimore, Maryland, where the ship was unloaded by stevedores into railroad freight cars. Canton allowed the consignee fifteen days free storage.

Pursuant to shipping instructions from William H. Masson, agent of Borregaard & Company, received by Canton on July 12, 1946, Canton transported the 1481 bales or 633,412 pounds of woodpulp to E. I. DuPont DeNemours & Company, as follows:

Car Initial and No.	Destination	Date Shipped (1946)	No. Bales	Weight
CNW 147192	Amphthill Siding, Richmond, Va.	7/12	164	70,142
GN 45642	Allegheny Warehouse A, Richmond, Va.	7/12	188	80,406
SLSF 162555	Allegheny Warehouse A, Richmond, Va.	7/12	188	80,406
PRR 121996	Allegheny Warehouse A, Richmond, Va.	7/12	188	80,406
GN 45127	Allegheny Warehouse A, Richmond, Va.	7/13	188	80,406
PRR 54972	Allegheny Warehouse A, Richmond, Va.	7/15	189	80,834
HP 28880	Allegheny Warehouse A, Richmond, Va.	7/15	188	80,406
ACL 51459	Allegheny Warehouse A, Richmond, Va.	7/15	188	80,406
			1,481	633,412

[fol. 58] Canton on said dates switched the above cars to its connection in Baltimore with the line of the Pennsylvania Railroad, for which Canton made a charge of 37¢ per net ton, the charge being paid to Canton by the Pennsylvania Railroad Co. Canton received its payment from the Pennsylvania Railroad on the basis of a monthly statement of account submitted by Canton to the Pennsylvania Railroad.

Canton's gross receipts for its said services in forwarding the said import of woodpulp were $117.18 (37¢ per net ton x 633,412 lbs.) for switching.

* * * * * * *

Import No. 2

In March of 1946, 31,000 one-hundred pound bags of sugar, consigned to various companies in the United States by Golodetz and Company of New York, were shipped from Cuba abroad the S. S. Corinto via the Canton Docks in Baltimore, Maryland. The shipment arrived at Canton's Pier No. 4 in Baltimore on March 19, 1946 and was forwarded by Canton according to instructions received from Golodetz and Company or its representatives.

Typical of the handling by Canton of the said shipments are the following dispositions:

(a) On March 20, 1946, Canton received hauling order No. 3360 from the Stickwell Sales Company, Baltimore, which made the sale for Golodetz & Company, directing Canton to deliver 170 bags of said sugar to the purchaser thereof, Wm. J. B. Shanks Company, Baltimore, delivery to be taken by the buyer's truck at Canton's Pier No. 4. Pursuant to this order, Canton, on March 20, 1946, delivered to the buyer's truck, license Md. 231-303, 170 bags of said sugar.

In connection with this delivery Canton furnished top wharfage for which service it made a charge of 2¾¢ per 100 pounds or $4.70 (2¾¢ per 100 lbs. x 17,085 lbs.) A bill [fol. 59] for this amount was submitted by Canton on March 27, 1946 to Golodetz & Company and paid shortly thereafter.

(b) On March 20, 1946, Canton received hauling order No. 3679 from the Stickwell Sales Company, Baltimore, which made the sale for Golodetz & Company, directing Canton to deliver 300 bags of sugar to the purchaser thereof, Seven-Up Company, Washington, D. C., delivery to be taken by the buyer's truck at Canton's Pier No. 4. Pursuant to this order Canton shortly thereafter, delivered to buyer's truck, license D. C.-DT-193, 300 bags of said sugar. In connection with this delivery Canton furnished top wharfage and for such service billed Golodetz & Company for the amount of $8.29 (2¾¢ per 100 lbs. x 30,150 lbs.) on March 27, 1946 which was paid shortly thereafter.

(c) On March 28, 1946, Canton received shipping instructions from William H. Masson, agent of Golodetz & Company directing Canton to ship 1180 bags of said sugar to Geeman Bakeries, Cleveland, Ohio. Canton forwarded the same on March 29, 1946, via CRR-PRR on car NYC No. 161067. For its switching services Canton imposed a charge of 33¢ a net ton or $19.57 (118,590 lbs. x 33¢ a net ton) which was paid by the Pennsylvania Railroad Co.

(d) On March 25, 1946, Canton received shipping instructions from William H. Masson, agent of Golodetz & Company, directing Canton to ship 1000 bags of said sugar to the Hershey Chocolate Corporation, Hershey, Pennsylvania. Canton forwarded the same on March 29, 1946, via CRR-PRR-Reading on car Milw. No. 715048. For its switching services Canton imposed a charge of 33¢ a net ton or $16.58 (100,500 lbs. x 33¢ per net ton) which was paid by The Pennsylvania Railroad Company.

. . . . . .

[fol. 60] Import No. 3

In connection with the said shipment of sugar from Cuba to the United States via Canton, Baltimore, Maryland, which was unloaded at Canton Docks by the S. S. Corinto and consigned by Golodetz & Company to various companies in the United States, Canton allowed Golodetz & Company, consignor, 5 days free storage. At the expiration of 5 days all remaining sugar was subject to a storage charge of 5½¢ per 100 lbs. per month.

325,643 pounds or 3,292 bags of sugar, along with 2,292 pounds of sweepings, were left in the custody of Canton in excess of the five-day period awaiting forwarding instructions as hereinbefore described. For the storage of this sugar Canton imposed a charge of $180.36 at the above rate. Canton billed Golodetz & Company in this amount on March 30, 1946, and received payment shortly thereafter.

. . . . . .

Import No. 4

In August of 1946, 12,006,520 pounds of Russian chrome ore, consigned by the R. F. C. Office of Metals Reserve to the Treasury Department, Procurement Division, Seneca Ordinance Depot, Kendaia, New York, were shipped from

Russia aboard the S. S. Kamenetz Podolsk. On August 24, 1946, the S. S. Kamenetz Podolsk docked at the pier of the Canton Railroad Company. Pursuant to directions from the traffic manager of the R. F. C. Office of Metals Reserve, The Cottman Company unloaded the ship by means of a crane. The crane used was the property of the Canton Railroad Company but was operated by The Cottman Company, the latter paying the former 7½¢ a long ton for all goods unloaded by means of the crane.

3,892,320 pounds were unloaded by means of the crane; the residue was unloaded by other means not furnished by Canton. Canton's receipts for crane privileges were [fol. 61] $130.32 (7½¢ per long ton x 3,892,320 lbs.). Canton also furnished switching services in connection with this shipment. A total of 99 carloads of ore were switched at the rate of 37¢ a net ton or $2,221.21 (37¢ net ton x 12,006,520 lbs.

According to directions from the traffic manager of R. F. C. Office of Metals Reserve, these cars were shipped out by Canton between August 24 and August 28, 1946, to the Treasury Department, Procurement Division, Seneca Ordnance Depot, Kendaia, New York, via CRR, WMD, RDG, LV. Canton was paid for its switching by the Western Maryland Railroad Co.

* * * * * * *

Import No. 5

In July of 1946, 12,176,040 pounds of South African manganese ore, consigned by the Isthmian Steamship Company to the Carnegie Illinois Steel Corporation, Isabella Furnaces, Etna, Pennsylvania, were shipped from Durban, South Africa, aboard the S. S. Carrier Pigeon. On August 7, 1946, the S.S. Carrier Pigeon docked at Cottman's Crane Pier, Baltimore.

According to directions received from the Isthmian Steamship Company on August 2, 1946, the Cottman Company unloaded 7,246,440 pounds of ore by means of a crane owned by Canton. The residue of the cargo, 4,929,600 pounds, was unloaded by other means not furnished by Canton. Canton received $242.63 (7½¢ per long ton x 7,246,440 pounds) for the use of its crane from the Cottman Company.

The entire cargo of ore, 12,176,040 pounds was loaded into 87 cars and shipped out between August 7, 1946, and August 14, 1946, and consigned in bond by Canton to the Carnegie Illinois Steel Corporation, Isabella Furnaces, Etna, Pennsylvania, c/o Collector of Customs via CRR-PRR. Canton switched these 87 cars for which service it was paid by the Pennsylvania Railroad Co. 37¢ a net ton.

* * * * * * *

Import No. 6

[fol. 62] In August of 1946, 6,501,780 pounds of Indian manganese ore, consigned by the Bethlehem Steel Company to the Bethlehem Steel Company, Johnstown, Pennsylvania, were shipped from Vizagapata, India, aboard the S. S. Malancha. On August 25, 1946, the S. S. Malancha docked at the Canton terminals.

According to instructions from the F. H. Shallus Company, Baltimore, forwarding agents, the ship was unloaded by means of Canton's crane, operated by the Cottman Company and other means not furnished by Canton. 1,774,160 pounds of ore were unloaded by crane for which Canton received $59.40 (7½¢ per long ton x 1,774,160 pounds) from the Cottman Company.

The entire cargo of ore 6,501,780 pounds, was loaded into 54 cars and shipped out between August 25, 1946 and August 29, 1946, forwarded, pursuant to instructions, to the Bethlehem Steel Company, Johnstown, Pennsylvania, and routed via CRR-B&O-C&BL. Canton switched these 54 cars for which service it was paid by the B&O 37¢ a net ton.

* * * * * * *

Import No. 7

In January of 1946, the S. S. Joseph W. Hallister sailed from Europe with a cargo of 3,393,600 pounds of sand ballast consigned to the U. S. War Shipping Administration. This ship docked at Canton's pier and was unloaded on January 19, 1946 pursuant to directions from the U. S. War Shipping Administration. The unloading was done by means of a crane owned by Canton and operated by the Cottman Company. The sand was placed directly into lighters, and thus Canton furnished no other service in connection with this shipment. However Canton did not

impose its usual charge of 6½¢ per net ton unloaded for the privilege of side wharfage.

On February 28, 1946 Canton billed the U. S. War Shipping Administration in the amount of $110.31 (6½¢ per [fol. 63] net ton or fraction thereof x 3,393,600 pounds) for the side wharfage facilities furnished.

* * * * * * *

Import No. 8

Between February 11 and February 14, 1946, the S. S. Llandaff discharged at a pier of the Canton Railroad Company 67 carloads of Brazilian metallurgical grade manganese ore, shipped from Brazil, and consigned to the R. F. C. Office of Metals Reserve. These cars were switched by Canton to Canton's storage facilities, there unloaded and the ore stored.

Of the 67 cars filled with the cargo of ore, 5 carloads were composed of ore which could not be unloaded by means of a crane and thus could not be weighed by the crane scale as is the usual procedure. This fact necessitated a later weighing by Canton of these 5 cars, which service Canton furnished at the rate of 10¢ a gross ton weighed. For weighing these cars, Canton billed the R. F. C. Office of Metals Reserve in the amount of $31.65 (10¢ per gross ton x 316.48 gross tons) on February 28, 1946.

* * * * * * *

Export No. 1

On August 1, 1946, the Carnegie Illinois Steel Corporation, Irvin Works, Irvin, Pennsylvania, shipped on the Pennsylvania Railroad Co. on car PRR No. 840399 under waybill No. 914251 from Pittsburgh, 33 metal packages or 2,451 sheets of black sheet steel to the Canton Docks, Baltimore, Maryland, consigned to the United States Steel Export Company, Baltimore, for export to South Africa, the original way bill being so endorsed. Upon arrival of the car at Baltimore, Canton performed its customary forwarding switching services from its connection with the line of The Pennsylvania Railroad in Baltimore to Canton's [fol. 64] pier and charged for this service at the rate of 37¢ a net ton or $23.12 (37¢ a net ton x 125,035 lbs.) which charge was paid to Canton by The Pennsylvania Railroad

Co., Canton receiving payment on the basis of a monthly statement of account submitted to The Pennsylvania Co. by Canton.

The shipment was taken aboard the S. S. Robin Tuxford at Canton's pier in Baltimore and the said ship sailed from said pier for South Africa on August 7, 1946.

* * * * * * *

Export No. 2

On July 22, 1946, the Carnegie Illinois Steel Corporation shipped from Vandergrift, Pennsylvania on The Pennsylvania Railroad on car CN 427898 under way bill No. 7634, 276 bundles of black sheet steel to the Canton Docks, Baltimore, consigned to the United States Steel Export Company, Baltimore, for export to South Africa, the said original way bill being so endorsed. Upon arrival of this car in Baltimore, Canton performed its usual switching services from its connection with The Pennsylvania Railroad in Baltimore to Canton's pier and charged for this service at the rate of 37¢ a net ton or $11.36 (37¢ per net ton x 61,387 lbs.) which charge was paid to Canton by The Pennsylvania Railroad Company, Canton receiving payment on the basis of a monthly account submitted to The Pennsylvania Railroad by Canton.

This shipment was taken aboard the S. S. Robin Tuxford at Canton's pier in Baltimore and the said ship sailed for South Africa on August 7, 1946.

* * * * * * *

8. After the close of the hearing and the submission of the case for the decision of the Commission, the Commission on March 24, 1948 passed an order that Canton's "gross receipts tax" for the year 1947 as assessed is "constitutional" and its "protest is disallowed"; in view of this ruling on the law, that none of Canton's gross receipts [fol. 65] from its export and import business are exempt, the Commission neither approved nor rejected the amount of Canton's gross receipts claimed to be exempt from taxation under the Import-Export Clause of the United States Constitution, nor did it approve or reject the method by which such gross receipts were computed. The Commission admits, however, that the amount of tax involved

in this appeal is substantial although undetermined. By written notice dated March 24, 1948, the Commission notified Canton that a final assessment under Maryland Code, Article 81, Section 95 amounting to $1,588,774.48 had been entered by the Commission against Canton and that $1,588,744.48 was the amount of gross receipts in 1946 upon which th eCommission had finally computed and imposed upon Canton a gross receipts tax for 1947 in the amount of $39,092.34, and that, should Canton desire to further challenge the amount or validity of the assessment, it had the right under the law to appeal to the courts within thirty (30) days from the date of said notice.

9. An April 19, 1948, Canton filed in the Circuit Court No. 2 of Baltimore City a Petition of Appeal from said order and final assessment of the Commission. In said Petition, Canton alleged that the assessment appealed from included 1946 operating revenues (in the amount of $705,957.21) from Canton's import and export business, $565,713.30 thereof having been derived from switching, $62,663.63 thereof having been derived from storage, $57,122.24 having been derived from crane privilege, $17,348.09 thereof having been derived from wharfage, and $3,109.95 having been derived from weighing; that the Commission had erred in not holding as a matter of law that the inclusion of said operating revenues from Canton's 1946 import and export business in the measure of this 1947 franchise tax imposed upon it under Maryland Code, Article 81 Section 95; contravened the Import-Export Clause of the United States Constitution (Article 1, Section 10, Clause 2) and prayed the [fol. 66] Court to pass a decree declaring that the gross receipts tax assessed under the provisions of Maryland Code, Article 81, Sections 94½ to 99, inclusive, was unconstitutional and invalid as applied to the operating revenues of Canton derived from its import and export business, and for further relief.

10. On April 27, 1948, the Commission, pursuant to order of court, filed in said proceedings in the Circuit Court No. 2 of Baltimore City, a transcript of the record in the case before the Commission and upon Canton's said Petition and Appeal and said transcript of the proceedings before the Commission, a hearing was duly had before the Circuit

Court No. 2 of Baltimore City at which Canton appeared and was represented by counsel and at which the Commission appeared and was represented by the Attorney General and Deputy Attorney General of Maryland. No further testimony or evidence was offered by either party before the Circuit Court No. 2 of Baltimore City.

11. On June 24, 1949, the Circuit No. 2 of Baltimore City (Sherbow, J.) duly filed its written opinion, deciding that said final assessment made by the Commission against Canton for the year 1947 and the said gross receipts tax imposed by the Commission upon Canton for the year 1947 under Maryland Code, Article 81, Sections 94½ to 99, inclusive, were valid and, to the extent that said assessment included gross receipts derived by Canton from the transportation and handling of goods consigned for importation or destined for exportation, it did not contravene the Import-Export Clause of the Constitution of the United States (Article I, Section 10, Clause 2) and sustaining the decision of the Commission.

12. On June 29, 1949, the Circuit Court No. 2 of Baltimore City passed its order adjudging and decreeing "that the decision of the State Tax Commission of Maryland to include in the measurement of the petitioner's (Canton's) [fol. 67] gross receipts tax for the year 1947 receipts derived from the transportation of goods consigned for importation, or destined for exportation, be and the same is hereby sustained."

John Henry Lewin, J. Crossan Cooper, Venable, Baetjer and Howard, Attorneys for Canton Railroad Co. Hall Hammond, Attorney General of Maryland. Harrison L. Winter, Asst. Attorney General of Maryland. Attorneys for Joseph H. A. Rogan, et al. constituting the State Tax Commission of Maryland.

The foregoing statement of the case prepared pursuant to Rule 22 of the Rules of the Court of Appeals of Maryland respecting appeals is hereby approved.

J. L. Sherbow, Judge.

[fol. 68] 31 Op. Atty. Gen. 239

Tax on Freight on Articles in Course of Exportation

Section 500 of the War Revenue Act of October 3, 1917 (40 Stat. 314), should be construed as not intended to cover freight on articles in course of exportation.

The question whether articles are in course of exportation does not depend upon the bill of lading or like formal matters, but upon the real substance and intent of the shipment.

Department of Justice, March 12, 1918.

Sir: I have the honor to acknowledge your letter of the 27th ultimo requesting my opinion on the proper construction of certain portions of section 500 of the War Revenue Act of October 3, 1917, 40 Stat. 300, 314.

That section, in so far as material to your inquiry, provides:

"There shall be levied, assessed, collected, and paid (a) a tax equivalent to three per centum of the amount paid for the transportation by rail or water * * * of property by freight consigned from one point in the United States to another; * * *."

Section 501 of the act provides:

"That the taxes imposed by section 500 shall be paid by the person, corporation, partnership, or association paying for the services of facilities rendered."

For the purpose of promulgating proper regulations for the assessment and collection of the taxes imposed by section 500, you make the following specific inquiries:

"1. In view of the provision of Article I, section 9 of the Constitution that 'no tax or duty shall be laid on articles exported from any State,' may the tax imposed by section 500 of the act be held to apply to the transportation of 'property by freight consigned from one point in the United [fol. 69] States to another' when that property is moving in the course of exportation?

"2. If the tax imposed by section 500 can not in view of the constitutional prohibition be held to apply to the transportation of property by freight consigned when such

property is moving in the course of exportation, what is the test as to whether or not such property is in the course of exportation? Is the test solely whether the property is moving upon a through bill of lading or other shipping document covering the exportation, or is it sufficient to establish its export character that the property is being moved for export, even though it is shipped upon a local bill of lading?"

1. The tax levied by section 500, *supra*, is directly upon the freight, that is, upon the price paid for the carriage of the goods, and the burden of it falls on the consignor or consignee. It is therefore without question a tax or duty on the transportation itself, and, looked at merely from the point of view of its incidence as a tax, it does not apparently differ, in its legal aspect, from a tax on the bill of lading, on the warehouse receipt, on the charter party, on the manifest, or on the policy of marine insurance, all of which have been held to be a tax on articles exported within the meaning of the Constitution (Fairbank v. U. S., 181 U. S. 283; N. Y. & Cuba Mail S. S. Co. v. U. S., 125 Fed. 320, 200 U. S. 488, 491; Selliger v. Kentucky, 213 U. S. 200, 207; U. S. v. Hvoslef, 237 U. S. 1; Thames and Mersey Marine Ins. Co. v. U. S., 237 U. S. 19). Indeed, insofar as the mere incidence of the tax is concerned, the matter seems to be settled by U. S. v. Hvoslef, *supra*, for the charter parties in that case were described by the Supreme Court as "in contemplation of law a mere contract of affreightment" (p. 16). In Thames and Mersey Ins. Co. v. U. S. *supra*, it is clearly implied on page 27 of the opinion that a tax on duty on freight would be a tax on the articles themselves.

In the cases cited above, the tax was directly upon transactions connected with the very act of exportation, while [fol. 70] in the present case the tax is laid only on the transportation within the United States. It cannot be regarded as a tax laid upon the shipments as exports or by reason or because of their exportation (Coe v. Errol, 116 U. S. 517, 525, 526). It is nevertheless, as stated above, a tax upon the act of transportation and not upon the goods as a part of the general mass of property within the United States, irrespective of their movement. In the case of U. S. v. Hvoslef, *supra*, the court said, p. 13:

"The prohibition relates only to exportation to foreign countries (Woodruff v. Parham, 8 Wall. 123; Dooley v.

United States, 183 U. S. 151, 154, 162), and is designed to give immunity from taxation to property that is in the actual course of such exportation (Pace v. Burgess, 92 U.S. 372; Turpin v. Burgess, 117 U. S. 504; Cornell v. Coyne, 192 U. S. 418). This constitutional freedom, however, plainly involves more than mere exemption from taxes or duties which are laid specifically upon the goods themselves. If it meant no more than that, the obstructions to exportation which it was the purpose to prevent could readily be set up by legislation nominally conforming to the constitutional restriction, but in effect overriding it. It was the clear intent of the framers of the Constitution that 'the process of exporting the products of a State, the goods, chattels, and property of the people of the several States should not be obstructed or hindered by any burden of taxation.' Miller on the Constitution, p. 592."

The distinction between articles in the course of transportation to foreign countries and articles merely being manufactured, or warehoused, for exportation is justified by the decisions quoted by the Supreme Court of Pace v. Burgess, Turpin v. Burgess, and Cornell v. Coyne, as well as by the cases cited, infra, on the necessity of a through bill of lading. It is evident that a tax upon the freight on articles destined for export might cause a serious discrimination between inland States and those situated near the seaboard, and thus produce the very evil the Constitution intended to prevent.

[fol. 71] However, it is not necessary for present purposes to go further than to say that the power to levy a tax on the freight on articles moving in the course of transportation to foreign countries is so doubtful as to lead to the conclusion that Congress did not intend by section 500 to exercise it, but merely meant to cover property "consigned from one point in the United States to another," not in the course of exportation. (See U. S. v. Jin Fuey Moy, 241 U. S. 394, 401.)

2. It is now entirely settled that the question whether goods are in the course of transportation in interstate or foreign commerce does not depend upon the bill of lading or formal matters of that sort, but upon the real substance and intent of the shipment. (Texas & N. O. R. R. Co. v. Sabine Tram. Co., 227 U. S. 111; and cases cited; Louisiana

R. R. Comm. v. Tex. & Pac. Ry., 229 U.S. 336; So. Covington Ry. v. Covington, 235 U. S. 537, 545; Ill. Cent. R. R. v. Louisiana Railroad Commission, 236 U. S. 157, 163; Atchison & Topeka Ry. v. Harold, 241 U. S. 371, 375, 376). The case is different where the shipment is, in fact, "broken." (Gulf, Colorado & S. F. Ry. Co. v. Texas, 204 U. S. 403.)

My conclusion is that section 500 should be construed as not covering freight on articles in course of exportation, and that articles may be in course of exportation without a through bill of lading. I venture to suggest, however, that your regulations require strict proof of the fact that the shipment in question is really destined for export.

Respectfully yours, T. W. Gregory.

To The Secretary of The Treasury.

[fol. 72] In Court of Appeals of Maryland, October Term, 1949

Nos. 76-96

Western Maryland Railway Co.

vs.

State Tax Commission of Maryland

Canton Railroad Co.

vs.

Joseph H. A. Rogan, et al., const. the State Tax Commission of Md.

Argued before Marbury, C. J., Delaplaine, Collins, Grason, Henderson and Markel, JJ.

Opinion by Collins, J.—Filed April 19, 1950

Delaplaine, J., and Markell, J., Dissent

[fol. 73] These appeals are taken by Western Maryland Railroad Company (Western Maryland) and Canton Railroad Company (Canton), from decrees of Circuit Court No. 2 of Baltimore City sustaining final assessment against the appellants made by the Maryland State Tax Commission

(the Commission) for gross receipts taxes imposed by Article 81, Section 95 of the 1943 Supplement of the Code.

In the case of Western Maryland the contested taxes for the years 1946 and 1947 are computed upon its gross receipts within the State of Maryland for the preceding calendar years of 1945 and 1946, respectively. In the case of Canton the contested taxes for the year 1947 were computed upon its "gross receipts for the calendar year 1946" within the State of Maryland. Both appellants claim that certain portions alleged to have been derived from their services rendered in "the importing and exporting process" should not have been included within the total amount of gross receipts subject to the tax. They claim that Article 1, Section 10, Clause 2, of the Constitution of the United States grants immunity to that portion of the gross receipts.

The pertinent provisions of Article 81, sections 94½ and 95, 1945 Supplement of the Code follow:

"94½. The phrases 'gross receipts,' 'total receipts,' 'gross earnings,' 'total earnings' and 'all earnings', as used in Sections 95 to 100, inclusive, mean in the case of railroads and other public service corporations, the operating revenues thereof, without any deductions or credits of any kind [fol. 74] whatsoever. When any public service corporation is engaged in more than one class of business and one or more classes thereof is business not subject to the gross receipts tax or subject thereto at different rates, the operating revenues of the class or classes of business subject to such tax at different rates shall be reported separately and taxed at the rate or rates applicable to such class or classes of business. This section shall not be construed as implying that in the absence of this section the requirements of Sections 95 to 100, inclusive, could properly be otherwise construed.

95. (a) A State tax as a franchise tax is hereby levied annually for the year 1930 and subsequent years measured by the gross receipts for the preceding calendar year, of:

(1) All domestic or foreign railroad companies, whose roads are worked by steam, doing business in this State, at the following rates, to wit:

One and one-quarter per centum on the first $1,000 per mile of gross earnings, or on the total earnings if they are less than $1,000 per mile; and

Two per centum on all gross earnings above $1,000 and up to $2,000 per mile; and

Two and one-half per centum on all earnings in excess of $2,000 per mile.

* * * * * * *

(b) If any such railroad company has part of its road in this state and part thereof in another State or States, such company shall return a statement of its gross receipts over its whole line of road, together with a statement of the whole length of its line and the length of its line in this State, and such company shall pay to the State, at the said rates hereinbefore prescribed upon such proportion of its gross earnings as the length of its line in this State bears to the whole length of its line; and similar statements shall be made by each oil pipe line company, and each sleeping car, parlor car, express or transportation company, telephone or telegraph or cable company, so that the proportion of the said gross earnings of the said companies, respectively, accruing, coming from their business within this State, may be accurately ascertained, or said statement may be made in any other mode satisfactory to and required by the State Tax Commission. The said gross receipts taxes shall be due and payable at the treasury on or before the first day of July in each year.

(c) Every partnership or individual engaged in any of [fol. 75] the above enumerated branches of business in this State shall be subject to the tax imposed by this section and comply with all provisions relating thereto as if such firm or individual were a corporation."

The so-called Import-Export clause of the Constitution of the United States, Article 1, Section 10, Clause 2, follows:

"No State shall, without the consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws; and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress." See The Federalist, No. 42; 3 Elliot's Debates, 483; 14 U. of Chicago Law Review, 672.

The operating revenues claimed by the appellants to be exempt were received for transportation, switching, storage, crane privileges, wharfage and weighing of coal, grain, ores, and other miscellaneous commodities in transit between foreign ports and points within the United States. Appellant (Canton) claims that the tax in question is an occupation tax exacted for the privilege of engaging in the import-export process and therefore unconstitutional. This Court in a long line of cases has sustained the statutory declaration, supra, that the tax here in question is a franchise tax in lieu of all other State property taxes.

In the case of State v. Philadelphia, Wilmington, and Baltimore Railroad Company, 45 Md. 361, the Court had before it Chapter 234 of the Acts of 1872 which was the predecessor of the present Gross Receipts Tax. This Court said in that case at page 379 in holding the tax constitutional: "Properly speaking, the tax is not imposed upon the [fol. 76] gross receipts; they are referred to not as descriptive of the subject to be taxed, but merely as furnishing the basis of ascertaining the amount of tax to be paid. If then it is not a tax upon property, what is it? We say, it is a tax upon the *franchise* of railroad companies, measured by the extent of their business." At page 381 it was said: "Being of opinion, then, that the tax upon gross receipts of railroad companies, imposed by the Act of 1872, is a tax upon the franchise of such companies, and not upon their property, * * * we come to the question whether the defendant corporation is exempt from the payment of said tax?" State vs. B. & O. R. R. Co. 48 Md. 49 (1878); Cumberland vs. Pennsylvania R. R. Co. 92 Md. 668 (1901); State v. U. S. F. & G. Co. 93 Md. 314 (1901); State v. Central Trust Co., 106 Md. 268 (1907); Postal Telegraph Cable Co. vs. Harford County, 131 Md. 96 (1917); Rogan v. Baltimore & Ohio Railroad Co., 188 Md. 44 (1947); State Tax Commission v. Western Maryland Railway Co., 188 Md. 240, 246 (1947).

Western Maryland makes no contention that this is not an in lieu franchise tax. Canton to sustain its contention that the tax is an occupation tax and not an in lieu franchise tax cites Section 144 of Article 81 of the Code (1947 Supplement) which imposes a general franchise tax on corporations. Section 144(b) explicitly says that the tax is imposed "for its franchise to be a corporation." Sections 95, supra, and 144 supra, tax different kinds of franchises. The fran-

chise to operate a railroad is of course different from the [fol. 77] ordinary privileges conferred by a franchise to operate as a corporation.

Canton also contends that the tax here in question is not a franchise tax in lieu of property taxes because it is not proportionate in amount to the property taxes to which it would have been liable. Canton bases this argument on the fact that if the ordinary rate of State taxes is applied to the assessed value of its property for the calendar year 1946 its taxes would have been $3800.00 while its gross receipt taxes for that period amount to $39,092.00. Appellee points out in its brief that when Chapter 965 of the Acts of 1945, (substantially reenacted, except as to rates, by Chapter 677 of the Acts of 1947 and codified as Sections 7 (15), 25 (h), 94½ and 95 of Article 81, 1947, Supplement of the Code), is taken into consideration Canton's ad valorem property tax for the calendar year of 1946, as taxes on operating property, including land, would have been $40,681.00, an amount of $1000.00 "more than the amount of gross receipt taxes imposed for the gross receipts derived during that calendar year." Nashville C. & St. L. Ry. vs. Browning, 310 U. S. 362. Ohio River & W. R. Co. vs. Dittey, 232 U. S. 576.

Appellant (Canton) states in its brief: "If it were an original proposition, one might well argue that the phrase 'any Imposts or Duties on Imports or Exports' was intended to mean no more than property taxes on goods while they constitute imports or exports, or, at the most, taxes [fol. 78] in the nature of a tariff. The construction which the Supreme Court has placed upon these words through the years is to the contrary."

The in lieu franchise tax on apportioned gross income has been held valid under the Commerce Clause of the Constitution because it is not a direct tax on interstate business, not because the tax does not in the end increase the cost of interstate business. Such taxes are held valid because they are in lieu taxes and substitute for a property tax which is constitutional. Maine v. Grand Trunk Railroad Co., 142 U. S. 217, (1891); U. S. Express Co. v. Minnesota, 223 U. S. 335, (1912); Cudahy Packing Co. v. Minnesota, 246 U. S. 450, (1918); Northwestern Life Insurance Co. v. Wisconsin, 247 U. S. 132, (1918); Great Northern Railway Co. v. Minnesota, 278 U. S. 503, (1929); Illinois Central Railway Co. v. Minnesota, 309 U. S. 157, (1940); State

Tax Commission v. Western Maryland Railway Co., 188 Md. 240, supra.

An ad valorem property tax on tangible and intangible personal property both used in and derived from the process of importing and exporting is valid. W. P. & Cincinnati Transport Co. vs. Wheeling, 99 U.S. 273 (1879) Burke vs. Wells, 208 U. S. 14. If such an ad valorem tax is constitutional it certainly appears that a franchise tax in lieu of such direct ad valorem taxes is not barred by the Import-Export Clause. New York, ex rel. Parke, Davis & Co. vs. Roberts, 171 U. S. 658 (1898). People, ex rel. American Soda Fountain Co. vs. Roberts, 158 N. Y. 168 (1899).

[fol. 79] Both Canton and Western Maryland contend that this tax measured by the gross receipts for handling articles previously imported or to be exported and in "the importing and exporting process," is prohibited by the Import-Export Clause. Of course, a direct tax on imports and exports such as a license tax on the occupation of importing, a direct tax on sales of imports and exports, a tax on the actual doing of an import business, a direct tax on objects in process of importing or exporting, are constitutionally invalid under the Import-Export Clause. Brown vs. Maryland, 12 Wheat. 419, (1827); Crew Levick Co. vs. Pennsylvania, 245 U. S. 292; Anglo-Chilean Nitrate Sales Corp. vs. Alabama, 288 U. S. 218; Spalding & Bros. vs. Edwards, 262 U. S. 66; Hooven & Allison Co. v. Evatt, 324 U. S. 652.

The tax here in question is not a direct tax on imports or exports like that of a State stamp tax upon bills of lading for the export of gold and silver; or a federal stamp tax on an export bill of lading for wheat exported; or an ad valoreum tax on warehouse receipts issued on account of whiskey physically in a foreign country; or a federal stamp tax on charter parties exclusively for the carriage of cargoes from State ports to foreign countries; or a tax applied against contracts of marine insurance which were held to be an integral part of exportation. Almy vs. California, 65 U. S. 169, (1861); Fairbanks vs. United States, 181 U. S. 283, (1901); Selliger vs. Kentucky, 213 U. S. 200, (1909); United States vs. Hvoslef, 237 U. S. 1, (1915); Thames & Mersey Insurance Co. vs. United States, 237 U. S. 19, (1915).

[fol. 80] In W., P. & Cincinnati Transport Company vs. Wheeling, 98 U. S. 273, 25 L. Ed. 412 (1879), supra, the city of Wheeling imposed a personal property tax upon vessels in the amount of $.50 on each $100 of the assessed value

thereof. Those vessels were used in the import-export traffic. The tax was attacked. The Supreme Court in holding this tax valid and constitutional said in part: "Power to impose taxes for legitimate purposes resides in the States as well as in the United States; but the States cannot, without the consent of Congress, lay any duty of tonnage, nor can they levy any imposts or duties on imports or exports except what may be absolutely necessary for executing their inspection laws, as without the consent of Congress they are prohibited from exercising any such power. Outside of those prohibitions the power of the States extends to all objects within their sovereign power, except the means and instruments of the Federal Government. State Tonnage Tax Cases, 12 Wall., 204 (79 U. S., XX., 370)." One of the cases relied on by the Court in that opinion was the Maryland case of Howell vs. State, 3 Gill 14.

In New York ex rel. Burke vs. Wells, 208 U. S. 14, 52 L. Ed. 370 (1908), supra, the City of New York assessed for ad valorem personal property taxes, among other things, the cash on hand and notes owned by a foreign corporation doing business in New York State as importers, which were the proceeds of the sale of imported goods in the unbroken original packages. The Supreme Court of the United States held that those items could be taxed under [fol. 81] the New York law as capital employed in business within the State without infringing Article I, Section 10, of the Constitution of the United States, although most of the proceeds of such sales were remitted to the home office of the corporation in Ireland.

In New York, ex rel. Parke, Davis & Co. v. Roberts, 171 U. S. 658, 43 L. Ed. 323 (1896), supra, it was held that a franchise tax on the amount of the capital stock employed within the State by a foreign corporation conducting a strictly private business is not invalid because a part of its business consists of the importation and sale of articles in original packages. It was contended in that case that this tax was unconstitutional and invalid under the case of Brown v. Maryland, supra. In reply to that argument the Supreme Court of the United States said: "But that case is inapplicable. *Here no tax is sought to be imposed directly on imported articles or on their sale.* This is a tax imposed on the business of a corporation, consisting in the storage and distribution of various kinds of goods, some products of their own manufacture and some imported articles. From

the very nature of the tax, being laid as a tax upon the franchise of doing business as a corporation, it cannot be affected in any way by the character of the property in which its capital stock is invested." (Italics supplied here.) [fol. 82] As herein stated the contested taxes here are for the years 1946 and 1947. Evidently the appellants rely largely on decisions of the Supreme Court of the United States since and beginning in 1946. Great reliance is placed by appellants on the case of Richfield Oil Corporation vs. State Board, 329 U. S. 69 (1946). The majority opinion was written by Mr. Justice Douglas with Mr. Justice Black dissenting. In that case by statute California levied a retail sales tax on certain oil "measured by the gross receipts of retail sales and levied on retailers 'For the privilege of selling tangible personal property at retail' ". The Richfield Oil Corporation contracted with the government of New Zealand for the sale of Oil, f. o. b. Los Angeles. Payment was to be made in London. Delivery was made by Richfield by its own pipe lines from its refinery in Calfornia to storage tanks at the Los Angeles harbor and pumped directly from the storage tanks into a vessel owned by the New Zealand government, in the harbor of Los Angeles, and consigned to the Naval Officer-in-Charge at Auckland, New Zealand. No portion of the oil was used or consumed in the United States. The Supreme Court of the United States, reversing the California Supreme Court held that the oil became an export no later than when it was delivered into the vessel and when the passage of title by delivery of the oil into the vessel took place, the oil had become an export. This sales tax was [fol. 83] therefore a direct tax upon an export and violated the Import-Export Clause. This case was very similar to and naturally followed the decision in Crew Levick Co. vs. Pennsylvania, 245 U. S. 292, supra.

Joseph vs. Carter & Weakes Co. 330 U. S. 422 (1947), involved a New York State occupation tax upon stevedoring measured by gross receipts from servicing ships at the port of New York. The goods moved both in interstate and foreign commerce. The majority of the Supreme Court of the United States held that this tax violated the Commerce Clause of the Constitution but made no reference to the Import-Export Clause which was argued to the Court. The majority opinion was written by Mr. Justice Reed, concurred in by the Chief Justice, and Justices Frank-

furter, Jackson, and Burton. Mr. Justice Black dissented totally from the majority opinion. Justices Douglas, Rutledge, and Murphy dissented on the proposition that the Commerce Clause was violated. Justices Douglas and Rutledge dissented from the invalidity of the tax under the Commerce Clause but were of opinion that it was invalid under the Import-Export Clause. This dissenting opinion was based upon the cases of Thames and Mersey Ins. Co. vs. United States, 237 U. S. 19, supra; Spalding & Bros. vs. Edwards, 262 U. S. 66, supra; Richfield Oil Corp. vs. State Board, 329 U. S. 69, supra. The tax here before us is certainly not comparable under the Import-Export Clause to the following taxes before the Supreme Court in the last three cases cited: a tax applied against a contract of marine insurance which is an integral part of ex-
[fol. 84] portation and so vitally connected therewith that a tax on the insurance policies is essentially a tax upon the export; a tax upon baseballs sold by a manufacturer in New York to a firm in Venezuela, marked for delivery to the purchaser in Venezuela, and delivered to the carrier as directed by the purchaser; a sales tax upon oil as in the Richfield Oil case, supra.

Joy Oil Company vs. State Tax Commission 337 U. S. 286, (1949) involved a personal property ad valorem tax. The gasoline on which the tax was levied was transported from Grand Rapids to Detroit, Michigan, for export, where it was placed in storage tanks from which it was to be shipped by water to Canada. On account of the inability of the taxpayer to obtain shipping space, the gasoline, except for 50,000 gallons exported, remained in Detroit for about fifteen months. The majority of the Supreme Court of the United States held that while the gasoline was stored in Detroit it did not constitute an export because it might have been used for domestic purposes. Four Justices dissented on the ground that all of the facts indicated that the gasoline would be exported. The minority opinion therefore was based on the fact that this was a direct tax on an export and therefore a violation of the Import-Export Clause. Another case involving an invalid direct tax on articles in export is Empresa Siderurgica, S. A. vs. County of Merced, 337 U. S. 154, (1949). That case is not in point here.

[fol. 85] It is argued that the Import-Export Clause should be given a more prohibitive effect than the Commerce clause

because of the fact that the former contains an express tax exemption whereas the latter does not. Neither clause literally supports the interpretations that have been put upon them by unchallenged decisions. The Commerce clause has been extended by implication to prohibit state exactions regardless of Federal regulation, and the Import-Export clause has been extended to cover not only exactions upon the goods themselves but on the integral parts of exportation. The solution of the problem as to where the line should be drawn can hardly depend on verbalism. We find no case dealing with the precise question now presented. On principle, we see no reason why a franchise tax measured by gross receipts, including receipts from foreign commerce, should be valid under one clause and not under the other, particularly where the tax is in lieu of other permitted taxes.

Decrees affirmed, with costs.

[fol. 86] In Court of Appeals of Maryland, October Term, 1949

Nos. 76-96

Western Maryland Railway Co.

vs.

State Tax Commission of Maryland

Canton Railroad Company

vs.

Joseph H. A. Rogan, et al., Const. the State Tax Comms. of Maryland

Argued before Marbury, C. J., Delaplaine, Collins, Grason, Henderson and Markell, JJ.

Dissenting Opinion by Markell, J. in Which Delaplaine, J. Concurs—Filed April 19, 1950

[fol. 87] On a federal question our duty is to follow the Supreme Court not to try to lead it. In the fourth Texas primary case, *Smith vs. Allwright*, 321 U. S. 649, 652, the

court remarked that the district court had denied relief and "the Circuit Court of Appeals quite properly affirmed its action on the authority of *Grovey v. Townsend*, 295 U. S. 45 [the third Texas primary case]." The court thereupon overruled *Grovey v. Townsend* and reversed the action "quite properly" taken by the lower court. We are not at liberty to guess about personalities, changes in personnel, or possible future changes in decisions, or to take the obscurantist attitude that determination of the present status of the authorities amounts to searching into the inscrutable and that we should therefore sustain the tax and let the Supreme Court strike it down if it will. As we have recently said, through Chief Judge Marbury, "If the Supreme Court did not mean what it said, or said more than it should, or what it should not have said, the responsibility is its and not ours." *Goetz v. Smith*. — Md. —, 62A 2d 602, 604. We may, and should, compare opinions of the court with dissenting opinions to determine the line of demarcation between them and the scope of the decisions of the court.

Cases under the Import-Export Clause are few in comparison with the multitude under the Commerce Clause. [fol. 88] For the first 150 years of the operation of the Constitution the Import-Export Clause, approximately but to a fluctuating degree, covered in the same way part of the same field as the Commerce Clause. Consequently in a case involving the broader field of the Commerce Clause it was seldom necessary to discuss the Import-Export Clause at all. In *Crew Levick Co. v. Commonwealth of Pennsylvania*, 245 U. S. 292, 295, in which the court held invalid a gross receipts tax on the business of selling goods in foreign commerce, it was said, "The bare question, then, is whether a state tax imposed upon the business of selling goods in foreign commerce, in so far as it is measured by the gross receipts from merchandise shipped to foreign countries, is in effect a regulation of foreign commerce or an impost upon exports, within the meaning of the pertinent clauses of the Federal Constitution. Although dual in form, the question may be treated as a single one, since it is obvious that, for the purposes of this case, an impost upon exports and a regulation of foreign commerce may be regarded as interchangeable terms." For the last ten years the field covered by the Import-Export Clause has, to an important extent, included taxes

not prohibited by the Commerce Clause. This important difference between the coverage of the two clauses is not due to changes in decisions under the Import-Export Clauses, with which we are here concerned, but to changes in decisions under the Commerce Clause with which for-
[fol. 89] tunately we are not concerned. With one exception (which will now be mentioned but is not now material) there has been from the first no change in the decisions under the Import-Export Clause. In *Brown v. Maryland*, 12 Wheat. 419, 449, (1827), it was "supposed" and in *Almy v. California*, 24 How. 169, (1861), it was assumed, as the basis of an unanimous opinion, that the Import-Export Clause is applicable to "imports" and "exports" from one state into another. In *Woodruff v. Parham*, 8 Wall. 123, (1869), these dicta were discarded and the clause held applicable only to imports from and exports to a foreign country.

On their face the Import-Export Clause and the Commerce Clause suggest two possible differences, (1) the Commerce Clause covers "commerce", the Import-Export Clause, "imports" and "exports", which conceivably might be construed as meaning only the goods imported or exported, not the business or process of importation or exportation, (2) the Commerce Clause does not contain any express tax exemption, the Import-Export Clause does. In *Brown v. Maryland, supra*, the first case under the Import-Export Clause, the first possible difference was negatived. That clause ever since has been construed as exempting from taxation not only the goods imported or exported, but the business and the process of importation or exportation. The second possible difference was never completely excluded, for about 150 years in a varying
[fol. 90] degree was almost elminated but in the last ten years has been definitely affirmed.

Until 1869 the Import-Export Clause was assumed to give an express tax exemption to transportation in foreign or interstate commerce. In 1873 there were decided the *State Freight Tax*, 15 Wall. 232, and the *State Tax on Railway Gross Receipts*, 15 Wall. 284, the former holding invalid a tax on freight, including interstate freight, at graduated rates per ton on different articles, the second sustaining a Pennsylvania tax on railway gross receipts, including receipts from interstate commerce. The opinions in both

cases were delivered by the same justice, but only four justices concurred in both decisions, which were essentially irreconcilable. After repeated subsequent decisions consistent with the *State Freight Tax*, the *State Tax on Railway Gross Receipts* was in effect overruled in *Philadelphia and Southern Steamship Co. v. Pennsylvania*, 122 U. S. 326, (1887).

Thereafter until about ten years ago it was held that interstate commerce, and specifically gross receipts from such commerce, were exempt from state taxation, with one important but elusive exception, viz., a gross receipts tax, by whatever name called, if it amounts to no more than the ordinary tax upon property or a just equivalent therefor is not unconstitutional. *Maine v. Grand Trunk Railroad Co.*, 142 U. S. 217, (1891), as explained in *Postal Cable* [fol. 91] *Co. v. Adams*, 155 U. S. 688, (1895) and *Galveston, Harrisburg and San Antonio Railway Co. v. Texas*, 210 U. S. 217, 227, (1908). Such a permitted tax has been called a commutation tax (210 U. S. 226) and, by counsel in the instant case, an "in lieu" tax. For about ten years, beginning with *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U. S. 33, (1940), the court has narrowed the effect of the Commerce Clause as prohibiting taxes which burden interstate commerce. The court still holds that, "From the Commerce Clause itself, there comes * * * an abridgment of the state's power to tax within its territorial limits. This has arisen from long-continued judicial interpretation that, without congressional action, the words themselves of the Commerce Clause forbid undue interferences by the states with interstate commerce [4] and that this rule applies in full force to an unapportioned [5] tax on the gross receipts from interstate business [6], where the taxes were not in lieu of *ad valorem* taxes on property [7]. (Citing cases in footnotes 4, 5, 6 and 7.)" *Joseph v. Carter & Weakes Co.*, 330 U. S. 422, 427. In the case just quoted a state tax on the gross receipts of a stevedoring corporation from work on ships engaged in interstate and foreign commerce was held unconstitutional under the Commerce Clause. The statement quoted is appreciably narrower than it might have been before the *Berwind-White* case.

In *Richfield Oil Corporation v. State Board of Equalization*, 329 U. S. 68, decided a few months before the *Joseph* case, the court indicated the change that had occurred in [fol. 92] the recent Commerce Clause cases, and, what is

more important and, I think, decisive in the instant case, the difference in this respect between the Commerce Clause and the Import-Export Clause. "* * * the Commerce Clause is cast, not in terms of a prohibition against taxes, but in terms of a power on the part of Congress to regulate commerce. It is well established that the Commerce Clause is a limitation upon the power of the States, even in absence of action by Congress. (Citing cases). But the scope of the limitation has been determined by the Court in an effort to maintain an area of trade free from state interference and at the same time to make interstate commerce pay its way. As recently stated in *McGoldrick v. Berwind-White Coal Mining Co., supra*, p. 48, the law under the Commerce Clause has been fashioned by the Court in an effort 'to reconcile competing constitutional demands, that commerce between the states shall not be unduly impeded by state action, and that the power to lay taxes for the support of state government shall not be unduly curtailed.' That accommodation has been made by upholding taxes designed to make interstate commerce bear a fair share of the cost of the local government from which it receives benefits (see *e. g. Western Live Stock v. Bureau of Revenue*, 303 U. S. 250, 254-255, and cases cited; *McGoldrick v. Berwind-White Coal Mining., supra*) and by invalidating those which discriminate against interstate commerce, which impose a levy for the privilege of doing it, which place an [fol. 93] undue burden on it. (Citing cases)." After thus describing the somewhat tenuous line between taxes which are prohibited and those which are permitted under the Commerce Clause, the court then makes plain that there is no exception at all from the unqualified tax exemption under the Import-Export Clause.

"It seems clear that we cannot write any such qualification into the Import-Export Clause. It prohibits every State from laying 'any' tax on imports or exports without the consent of Congress. Only one exception is created—'except what may be absolutely necessary for executing its inspection Laws.' The fact of a single exception suggests that no other qualification of the absolute prohibition was intended. It would entail a substantial revision of the Import-Export Clause to substitute for the prohibition against 'any' tax a prohibition against 'any discriminatory' tax. As we shall see, the question as to what is exportation

is somewhat entwined with the question as to what is interstate commerce. But the two clauses, though complementary, serve different ends. And the limitations of one cannot be read into the other." 329 U. S. 75-76.

. . . . . .

"We cannot, therefore, read the prohibition against 'any' tax on exports as containing an implied qualification." 329 U. S. 78. In the *Richfield* case the court held unconstitutional under the Import-Export Clause applica- [fol. 94] tion of a California gross receipts sales tax to an export shipment.

As a decision under the Import-Export Clause the *Richfield* case is not qualified, but reaffirmed, by the *Joseph* case. In the *Joseph* case five justices broadened the invalidation of the tax to include interstate commerce as well as imports and exports, seven condemned it as to imports and exports. It is impossible to escape Professor Powell's interpretation of the opinions in this respect. 60 Harvard Law Review 744. Though the majority opinion does not mention the Import-Export Clause it cites the crew Levick case to the very page quoted, *supra*, where the court said the two questions were one. Reason and authority may be surveyed in vain without finding any ground for holding that a tax, invalid under the Commerce Clause, could be valid, as to imports or exports, under the Import-Export Clause.

A tax on gross receipts from carriage of goods is manifestly a tax on exportation. Transportation is not an incident, direct or indirect, of commerce or exportation. It *is* commerce and exportation. The Export Clause (as far as it goes) is identical in scope with the Import-Export Clause. In *Thames & Mersey Ins. Co. v. United States*, 237 U. S. 19, a stamp tax on marine insurance policies on exports was held unconstitutional. The court said, "The rise in rates for insurance as immediately affects exporting as an increase in freight rates, and the taxation of policies insuring cargoes during their transit to foreign ports is as much [fols. 95-104] a burden on exporting as if it were laid on the charter parties, the bills of lading, or the goods themselves. Such taxation does not deal with preliminaries, or with distinct or separable subjects; the tax falls upon the exporting process." 237 U. S. 27. The major premise, that a tax on freight is a tax on exports, was taken as axiomatic.

Under the Commerce Clause, since the recent cases and perhaps before, it may be that the Maryland gross receipts tax is constitutional as an "in lieu" tax. Canton, but not Western Maryland, disputes this proposition on the facts, but the fact question, I think, is not adequately presented on the record. So far as imports and exports are concerned, the question as to the Commerce Clause is immaterial. In the Import-Export Clause "the prohibition against 'any' tax on imports and exports contains no implied qualification." It matters not, therefore, what is the present scope or extent of the "in lieu" qualification or exception to the cases condemning gross receipts taxes under the Commerce Clause. Before the instant cases no question as to the constitutionality of the gross receipts tax under the Import-Export Clause has ever been raised.

I think the tax, as to imports and exports, is unconstitutional and the judgment should be reversed.

Judge Delaplaine authorizes me to say that he concurs in this opinion.

[fol. 105] IN THE COURT OF APPEALS OF MARYLAND

[Title omitted]

PRAECIPE FOR TRANSCRIPT OF RECORD

To the Clerk:

You are hereby requested to make a transcript of the record to be filed in the Supreme Court of the United States pursuant to an appeal in the above-entitled case, and to include in said transcript of record the following papers, to wit:

1. The entire transcript on appeal to the Court of Appeals of Maryland from the Circuit Court No. 2 of Baltimore City consisting of

(a) Statement of the Case under Rule 22 of the Court of Appeals of Maryland respecting appeals, which was signed by the attorneys for the parties and approved by the Judge of the Circuit Court No. 2 of Baltimore City.

(b) Decree of the Circuit Court No. 2 of Baltimore City dated June 29, 1949.

[fol. 106] 2. Opinion and Decree of the Court of Appeals entered April 19, 1950, and the dissenting opinion.

3. Opinion of the Judge of the Circuit Court No. 2 of Baltimore City filed June 24, 1949.

4. Petition for Allowance of Appeal to the Supreme Court of the United States.

5. Assignment of Errors.

6. Judisdictional Statement.

7. Cost Bond for appeal and approval thereof.

8. Order Allowing Appeal.

9. Citation and Acknowledgment of Service thereof.

10. Notice of Service on appellees of Petition for Allowance of Appeal, Order Allowing Appeal, Assignment of Errors, Jurisdictional Statement, Notice as to Rule 12, paragraph 3 of the Revised Rules of the Supreme Court with Acknowledgment of Service thereof.

11. This Praecipe.

John Henry Lewin, Venable, Baetzer [not legible] & Howard, Attorneys for Canton Railroad Company, Appellant.

Service of the foregoing Praecipe and the receipt of a copy thereof are hereby acknowledged this 24th day of May, 1950, and it is hereby agreed that the matters set [fol. 107] forth in said Praecipe constitute the entire transcript of record on this appeal.

Hall Hammond, Attorney General; Harrison L. Winter, Assistant Attorney General, Attorneys for Appellees.

[fol. 108] Mandate

COURT OF APPEALS OF MARYLAND, OCTOBER TERM, 1949

No. 96

CANTON RAILROAD COMPANY

vs.

JOSEPH H. A. ROGAN, et al., const. State Tax Commission of Maryland

Appeal from the Circuit Court No. 2 of Baltimore City

Filed: September 14, 1949.

Oct. 3, 1949, Petition and Order filed granting permission to postpone No. 76 Oct. T., 1949 and hear jointly with No. 96 when No. 96 comes up for argument; appellee to file consolidated brief.

Apr. 19, 1950, Decrees affirmed with costs. (Nos. 76 & 96 combined.)

Opinion filed. Op. Collins, J.

Delaplaine, J. and Markell, J. dissent.

Markell, J. files dissenting opinion in which Delaplaine, J. concurs.

STATE OF MARYLAND, Set:

I, Maurice Ogle, Clerk of the Court of Appeals of Maryland, do hereby certify that the foregoing is truly taken from the record and proceedings of the said Court of Appeals.

In testimony whereof, I have hereunto set my hand as Clerk and affixed the seal of the Court of Appeals, this nineteenth day of May A.D. 1950.

Maurice Ogle, Clerk of the Court of Appeals of Maryland. (Seal.)

Costs shown on this Mandate are to be settled between counsel and *Not Through This Office*.

[fol. 109] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 110] IN THE SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS AND DESIGNATION OF THE PARTS OF THE RECORD—Filed June 2, 1950

Pursuant to Rule 13, Par. 9, Appellant hereby adopts, as the statement of the points on which it intends to rely, the points set forth in its Assignment of Errors.

Appellant designates the entire record as filed as necessary for the consideration of the points relied on.

John Henry Lewin; Venable, Baetzer [not legible] & Howard, Attorneys for Appellant.

Service of the above Statement of Points and Designation of Parts of the Record, and receipt of a copy thereof, admitted this 1st day of June, 1950.

Hall Hammond, Attorney General; Harrison L. Winter, Assistant Attorney General, Attorneys for Appellees.

[fol. 110a] [File endorsement omitted.]

[fol. 111] SUPREME COURT OF THE UNITED STATES

ORDER NOTING PROBABLE JURISDICTION—October 9, 1950

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is transferred to the summary docket.

Endorsed on Cover: File No. 54,602. Maryland, Court of Appeals, Term No. 96. Canton Railroad Company, Appellant, vs. Joseph H. A. Rogan, Owen E. Hitchens and William W. Travers, Constituting State Tax Commission of Maryland. Filed May 29, 1950. Term No. 96, O. T. 1950.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 96

CANTON RAILROAD COMPANY,

Appellant,

vs.

JOSEPH H. A. ROGAN, OWEN E. HITCHENS AND WILLIAM W. TRAVERS, CONSTITUTING THE STATE TAX COMMISSION OF MARYLAND.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF MARYLAND

STATEMENT AS TO JURISDICTION

JOHN HENRY LEWIN,
Counsel for Appellant.

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IN THE COURT OF APPEALS OF MARYLAND

CANTON RAILROAD COMPANY,
Appellant,

vs.

JOSEPH H. A. ROGAN, OWEN E. HITCHENS AND WILLIAM W. TRAVERS, CONSTITUTING THE STATE TAX COMMISSION OF MARYLAND.

JURISDICTIONAL STATEMENT

The Appellant, Canton Railroad Company, in support of the jurisdiction of the Supreme Court of the United States to review, upon appeal, the final decree of the Court of Appeals of Maryland filed April 19, 1950, in this case, respectfully shows:

A

Statutory Provision Sustaining Jurisdiction

The statutory provision which sustains the jurisdiction of the Supreme Court of the United States of this appeal is U. S. C. Title 28, Section 1257, and in particular paragraph (2) thereof, which, to the extent relevant, is as follows:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> • • •
>
> "(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being

repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

The above statutory provision is applicable to this appeal, because in this case there was drawn in question the validity of a statute of the State of Maryland (namely, Annotated Code of Maryland (1943 Supp.) Article 81, Sections 94½ and 95 set out below), on the ground of its being repugnant to Article 1, Section 10, Clause 2 (Import-Export Clause) of the Constitution of the United States, and the decision and final decree in this case rendered by the Court of Appeals of Maryland (two judges dissenting), which is the highest Court of Maryland in which a decision could be had, was in favor of the validity of said statute.

B

Statute of the State of Maryland the Validity of Which Is Involved

The statute of the State of Maryland, the validity of which was drawn in question as being repugnant to Article 1, Section 10, Clause 2 (Import-Export Clause) of the Constitution of the United States, and sustained by the decision and decree of the Court of Appeals of Maryland in this case, is Article 81, Sections 94½ and 95 of the Annotated Code of Maryland (1943 Supp.) and may be found at pages 862 and 863 of that volume, which is the official edition of the statutes of the State of Maryland. Article 81, Section 94½ of the Annotated Code of Maryland (1943 Supp.) is a codification of Laws of Maryland 1943, Chapter 488, Section 12, page 588, and Article 81, Section 95 of the Annotated Code of Maryland (1943 Supp.) is a codification of Laws of Maryland 1922, Chapter 351, Section 1, pages 784 and 785, and Laws of Maryland 1941, Chapter 906, Section 6, page 1654.

Article 81, Sections 94½ and 95 of the Annotated Code of Maryland (1943 Supp.) reads, to the extent relevant, as follows:

"94½. The phrases 'gross receipts', 'total receipts', 'gross earnings', 'total earnings' and 'all earnings', as used in Sections 95 to 100, inclusive, mean in the case of railroads and other public service corporations, the operating revenues thereof, without any deductions or credits of any kind whatsoever. When any public service corporation is engaged in more than one class of business and one or more classes thereof is business not subject to the gross receipts tax or subject thereto at different rates, the operating revenues of the class or classes of business subject to such tax at different rates shall be reported separately and taxed at the rate or rates applicable to such class or classes of business. This section shall not be construed as implying that in the absence of this section the requirements of Sections 95 to 100, inclusive, could properly be otherwise construed.

"95. (a) A State tax as a franchise tax is hereby levied annually for the year 1930 and subsequent years measured by the gross receipts for the preceding calendar year, of:

"(1) All domestic or foreign railroad companies whose roads are worked by steam, doing business in this State, at the following rates, to wit:

"One and one-quarter per centum on the first $1,000 per mile of gross earnings, or on the total earnings if they are less than $1,000 per mile; and

"Two per centum on all gross earnings above $1,000 and up to $2,000 per mile; and

"Two and one-half per centum on all earnings in excess of $2,000 per mile.

* * * * * * *

"(b) If any such railroad company has part of its road in this State and part thereof in another State or States, such company shall return a statement of its

gross receipts over its whole line of road, together with a statement of the whole length of its line and the length of its line in this State, and such company shall pay to the State, at the said rates hereinbefore prescribed upon such proportion of its gross earnings as the length of its line in this State bears to the whole length of its line; and similar statements shall be made by each oil pipe line company, and each sleeping car, parlor car, express or transportation company, telephone or telegraph or cable company, so that the proportion of the said gross earnings of the said companies, respectively, accruing, coming from their business within this State, may be accurately ascertained, or said statement may be made in any other mode satisfactory to and required by the State Tax Commission. The said gross receipts taxes shall be due and payable at the treasury on or before the first day of July in each year.

"(c) Every partnership or individual engaged in any of the above enumerated branches of business in this State shall be subject to the tax imposed by this section and comply with all provisions relating thereto as if such firm or individual were a corporation."

C

The Interpretations of the Statute Involved

The above-quoted statute of the State of Maryland has been construed by the Court of Appeals of Maryland, in this case and former cases, to lay and impose upon railroad companies operating in Maryland, not a property tax upon their operating properties or upon their gross receipts, but a franchise or privilege tax upon their privileges to engage in the business of operating a railroad, including their privileges of engaging in foreign commerce and in the importing and exporting process (*i.e.*, handling, transporting and forwarding imports and exports in transit). (See opinion of the Court of Appeals in this case, appended

hereto, and *State* v. *Philadelphia, Wilmington and Baltimore Railroad Company*, 45 Md. 361 (1876), *State* v. *Baltimore and Ohio Railroad Company*, 48 Md. 49 (1878) and *Cumberland and Pennsylvania Railroad Company* v. *State*, 92 Md. 668 (1901).

The tax is expressly laid and imposed upon individuals and partnerships engaged in the railroad business as well as upon railroad corporations, and has been construed in this case by the Court of Appeals of Maryland, not to lay or impose a franchise or privilege tax upon such railroad corporations' corporate franchises, or privileges to operate as bodies corporate in the corporate form, but upon their privileges to operate a railroad.

That portion of the over-all tax which is laid and imposed solely upon a railroad company's privilege to engage in intra-state commerce is separable from the rest of the over-all tax and is measured by its gross receipts derived from its intra-state railroad business alone; that portion of the over-all tax which is laid and imposed solely upon a railroad company's privilege to engage in foreign commerce and in the importing and exporting process (*i.e.*, handling, transporting and forwarding imports and exports in transit) is separable from the rest of the over-all tax and is measured by its gross receipts derived from its operations in foreign commerce and in the importing and exporting process alone. This interpretation follows from the statutory provision in Section 95 of Article 81 of the Annotated Code of Maryland (1943 Supp.) that the gross receipts measure the amount of the privilege taxes; from the second sentence of Section 94½ of Article 81 of the Annotated Code of Maryland (1943 Supp.), applying portions of the over-all gross receipts tax to each "class of business" engaged in by the taxpayer and requiring the gross receipts from each class of business engaged in, when taxed at a

different rate or not taxed at all, to be "reported separately"; and also follows from the decision in *State* v. *Baltimore and Ohio Railroad Company*, 48 Md. 49 (1878), which segregated, for purposes of the imposition of the franchise or privilege tax, the gross receipts of the Baltimore and Ohio Railroad Company derived from the different operations of that company. In other words, the tax is not laid merely upon a railroad company's privilege of engaging in intra-state commerce alone, measured by the gross receipts derived from all of its business, including its operations in foreign commerce and in the importing and exporting process.

D

The Final Decree of the Court of Appeals of Maryland Sought to Be Reviewed and the Application for Appeal Therefrom.

The final decree of the Court of Appeals of Maryland in this case, which is sought to be reviewed by this appeal, was entered by that court April 19, 1950. The words at the foot of the opinion of the Court of Appeals filed April 19, 1950, (appended hereto), reading "Decree affirmed, with costs", constitutes the final decree of that court and is made such by a rule of the Court of Appeals of Maryland dated December 6, 1949. No motion for reargument was filed in this case and, under the rules of the Court of Appeals of Maryland, the date upon which the time permitted for filing such motion for reargument expired May 19, 1950, on which date the mandate of the Court of Appeals of Maryland issued to the lower court, the Circuit Court No. 2 of Baltimore City. See *Market Street R. Co.* v. *Commission*, 324 U. S. 542, 548.

The appeal to the Supreme Court of the United States in this case was applied for by a Petition for the Allowance

of Appeal presented to the Chief Judge of the Court of Appeals of Maryland on May 24, 1950, and said appeal was allowed by order of the Chief Judge of the Court of Appeals of Maryland dated May 24, 1950.

U. S. C. Title 28, Section 2101(c) provides a period of ninety days after the entry of the decree appealed from in which the appeal may be taken.

E

The Nature of the Case and the Rulings of the Court of Appeals of Maryland and Lower Tribunals

Canton Railroad Company is a Maryland corporation engaged, as a common carrier of freight only, in operating a switching railroad, the lines of which lie wholly within Baltimore City and Baltimore County in the State of Maryland. It operates a marine terminal in the port of Baltimore, and its lines run from said marine terminal and connect with the trunk line railroad carriers serving the port of Baltimore. Its business of handling, transporting and forwarding freight in transit falls into three classes, namely, (1) intra-state commerce, (2) interstate commerce, and (3) foreign commerce and the importing and exporting process.

The last-mentioned class of its business consists of receiving from vessels which dock at its marine terminal, imports, such as ores, wood pulp and sugar, originally consigned from foreign countries to points in inland United States and, while they are in continuous transit and in their unbroken original packages, Canton Railroad Company, as the agent of the original consignors or the importer consignees of the goods, handles these imports at once at its piers (*i.e.*, weighs them, furnishes crane and wharf privileges and brief temporary storage), and trans-

ports them without delay to the points in Baltimore where its lines connect with the trunk line railroads, to which it delivers them to be carried to their ultimate destinations. See *Hooven & Allison Co.* v. *Evatt*, 324 U. S. 652 (1945). Canton Railroad Company also, as the agent of the original consignors of the goods, receives exports from these connecting carriers, which have been originally consigned from inland points in the United States to foreign countries and, as the connecting link in their over-all transit, transports them to its marine terminal, where these exports are loaded without delay upon vessels bound for their foreign destinations. See *Coe* v. *Errol*, 116 U. S. 517 (1886). Thus, in performing these importing and exporting services, Canton Railroad Company performs a necessary and indispensable component part of the importing and exporting process.

Canton Railroad Company is subject to and pays an annual state franchise tax "for its franchise to be a corporation", imposed by Article 81, Section 144 of the Annotated Code of Maryland (1947 Supp.). It also is subject to an annual State income tax upon net income over and above its railroad operating revenues less related expenses, imposed by Article 81, Sections 230, 223(m) of the Maryland Code (1947 Supp.). It also is subject to and pays substantial annual local ad valorem property taxes upon its operating properties to Baltimore County and Baltimore City, imposed by Article 81, Sections 6(5) and 13 of the Maryland Code (1947 Supp.). Its operating properties are exempted, by Article 81, Section 7(15) of the Maryland Code (1943 Supp.) from the comparatively small property taxes levied generally upon Maryland taxpayers for State purposes only.

In 1947, pursuant to Article 81, Section 96 of the Annotated Code of Maryland (1939 Edition), appellant duly and timely reported to the State Tax Commission of Maryland

(hereinafter referred to as "Commission") that appellant's total gross receipts derived from its railroad business in the State of Maryland during the previous year 1946 amounted to $1,588,774.48, and duly claimed on its reports and in letters to the Commission, citing pertinent authorities, that of these total gross receipts $705,957.21 had been derived by appellant from that class of its business constituting foreign commerce and the importing and exporting process described above, and that the same were constitutionally exempt and immune from taxation and could not be included as the measure of any state franchise or privilege tax sought to be imposed on such activities, and that no such state franchise or privilege tax could validly be imposed on the privilege of engaging in such activities, by reason of the provisions of Article 1, Section 10, Clause 2 of the Constitution of the United States (Import-Export Clause). (R. pp. 51, 52.)

Notwithstanding said claim, the Commission in December, 1947, imposed upon appellant, under Article 81, Section 95 of the Annotated Code of Maryland (1943 Supp.), a tentative assessment amounting to $1,588,774.48 and computed thereon a tentative franchise or privilege tax for the year 1947 amounting to $39,092.34. In so doing the Commission included in the franchise or privilege tax imposed upon appellant a separable franchise or privilege tax upon its privilege of engaging in foreign commerce and the importing and exporting process and included in the assessment or measure of the total tax appellant's separable gross receipts derived solely from its operations in foreign commerce and the importing and exporting process.

Thereupon appellant duly and timely applied to the Commission for a reduction of said tentative assessment in an amount equal to its gross receipts derived solely from its operations in foreign commerce and the importing and ex-

porting process, again claiming that the tentative assessment, insofar as it included such gross receipts, and that a franchise or privilege tax calculated on an assessment which included such gross receipts, would contravene the said Import-Export Clause of the Constitution of the United States (R. p. 53). This application for exemption of such gross receipts would, if recognized, have reduced the said assessment by $705,957.21, to an assessment of $882,817.27, and the said franchise or privilege tax by $17,648.34 to a tax of $21,444.00.

At a formal hearing on said application before the Commission, appellant duly offered factual evidence supporting its application, including detailed evidence showing that that portion of the franchise or privilege tax for 1947, as calculated by the Commission, imposed upon its privilege to engage in foreign commerce and the importing and exporting process, was over ten times greater in amount than a non-discriminatory ad valorem property tax for state purposes only would be, if the assessed value of appellant's properties utilized in its importing and exporting operations, should be taxed at the same ad valorem rate applicable generally to the property of other taxpayers in the state. Following said hearing the Commission on March 24, 1948, passed an order that appellant's gross receipts tax for the year 1947 as tentatively assessed was "constitutional" and its "protest is disallowed" and entered a final assessment againt appellant amounting to its total gross receipts, or $1,588,774.48, including gross receipts of $705,957.21 derived by appellant solely from its operations in foreign commerce and the importing and exporting process; and the Commission imposed a total franchise or privilege tax for the year 1947 upon appellant amounting to $39,092.34, which included a franchise or privilege tax upon appellant's privi-

lege to engage in foreign commerce and the importing and exporting process amounting to $17,648.34 (R. pp. 53-65).

On April 19, 1948, appellant duly and timely, pursuant to Article 81, Section 194(b) of the Annotated Code of Maryland (1947 Supp.), appealed from said order and final assessment to the Circuit Court No. 2 of Baltimore City, a state equity court of first instance having statutory jurisdiction in the premises to review judicially said assessment and order of the Commission and correct the same for errors of law only. In its petition of appeal to said court and at the trial of the issues of law therein, appellant contended that the assessment appealed from, in so far as it included therein $705,957.21 gross receipts derived by appellant solely from its operations in foreign commerce and the importing and exporting process, and that the franchise or privilege tax amounting to $17,648.34 whiel was imposed upon appellant's privilege to engage in foreign commerce and the importing and exporting process, contravened Article 1, Section 10, Clause 2 of the Constitution of the United States (Import-Export Clause) (R. pp. 65, 66). Appellant prayed said court to issue a decree holding and declaring that the provisions of Article 81, Sections 94½ and 95 of the Annotated Code of Maryland (1943 Supp.) were unconstitutional and invalid as applied to appellant's privilege to engage in foreign commerce and the importing and exporting process and to its gross receipts derived solely therefrom.

On June 24, 1949, the Circuit Court No. 2 of Baltimore City (Sherbow, J.), duly filed its written opinion (copy thereof appended hereto), deciding that the said statute, Article 81, Sections 94½ and 95 of the Annotated Code of Maryland (1943 Supp.) was valid and not repugnant to the said Import-Export Clause of the Constitution of the United States, and on June 29, 1949, the said Circuit Court No. 2

of Baltimore City entered its decree "that the decision of the State Tax Commission of Maryland to include in the measurement of the Petitioner's gross receipts tax for the year 1947 receipts derived from the transportation of goods consigned for importation or destined for exportation, be and the same is hereby sustained."

On June 30, 1949, appellant duly and timely, pursuant to Article 81, Section 194(b) of the Annotated Code of Maryland (1947 Supp.) as amended by 1949 Laws of Maryland, Chapter 413, entered an appeal to the Court of Appeals of Maryland, which is the highest court in the state of Maryland in which a decision could be had, from the said decree of the Circuit Court No. 2 of Baltimore City dated June 29, 1949. On such appeal, as stated in Section A of this Jurisdictional Statement, there was drawn in question by the appellant the validity of the statute of the State of Maryland (namely, Annotated Code of Maryland, 1943 Supplement, Article 81, Sections 94½ and 95), as set out in Section B of this Jurisdictional Statement, on the ground of its being repugnant to Article 1, Section 10, Clause 2 of the Constitution of the United States (Import-Export Clause). The record of the case in the Court of Appeals of Maryland consisted of a Statement of the Case prepared and signed by all the parties to the case with the approval of the lower court, as authorized by Rule 22 of the Court of Appeals of Maryland, showing how the questions in the case arose and were decided below. The decision and final decree in this case entered by the Court of Appeals of Maryland on April 19, 1950 (two judges dissenting), was in favor of the validity of said statute. Copies of the majority opinion of the Court of Appeals of Maryland and the dissenting opinion are appended hereto.

F

Substantiality of Questions Involved

Appellant contends on the following grounds that the questions involved in this appeal are substantial:

1. The Court of Appeals of Maryland, with two judges dissenting, held that a state may validly, notwithstanding Article 1, Section 10, Clause 2 of the Constitution of the United States (Import-Export Clause), lay and impose a franchise or privilege tax upon the privilege of a railroad company to engage in foreign commerce and in the importing and exporting process (by handling, transporting and forwarding, as agent for those owning and controlling the goods, imports and exports), and measure the tax by the gross receipts derived from the exercise of that privilege.

This holding runs directly counter to the following decisions of the Supreme Court of the United States, applying the prohibition of the Import-Export Clause to state taxes on analogous privileges, and to the reasoning and pronouncements of the Supreme Court supporting those decisions:

Richfield Oil Corp. v. *State Board of Equalization*, 329 U. S. 69 (1946), holding invalid as repugnant to the Import-Export Clause, a California franchise or occupation tax on retailers, measured by gross receipts, "for the privilege of selling tangible personal property at retail" as applied to the privilege of selling gasoline while it was an export, and emphasizing the distinction between the unqualified prohibition against "any" such tax contained in the Import-Export Clause and the more limited prohibition against certain state taxes implied in the Commerce Clause.

Cook v. *Pennsylvania*, 97 U. S. 566 (1878), holding invalid as repugnant to the Import-Export Clause and the Commerce Clause a Pennsylvania license or privilege tax upon the privilege of an auctioneer to sell imports at auction, measured by the gross receipts of the auctioneer from such sales.

Crew-Levick Company v. *Pennsylvania*, 245 U. S. 292 (1917).

Joseph v. *Carter & Weekes Stevedoring Co.*, 330 U. S. 422 (1947), holding invalid as repugnant to the Commerce Clause (and *a fortiori* impliedly holding invalid, insofar as foreign commerce was concerned, as repugnant to the Import-Export Clause) a New York tax upon the privilege of engaging in the business of stevedoring imports and exports moving in foreign commerce and also goods moving in interstate commerce, measured by the gross receipts from such business.

Puget Sound Stevedoring Co. v. *Commission*, 302 U. S. 90 (1937), holding invalid as repugnant to the Commerce Clause (and *a fortiori* impliedly holding invalid, insofar as foreign commerce was concerned, as repugnant to the Import-Export Clause) a Washington tax upon the privilege of engaging in certain occupations held to cover the occupation of stevedoring freight moving in interstate and foreign commerce, measured by the gross receipts from such business.

Almy v. *California*, 24 How. (U.S.) 169 (1860), holding invalid as repugnant to the Import-Export Clause a state stamp tax or excise upon the privilege of issuing a bill of lading for articles which were at the time of that decision regarded as exports.

Fairbanks v. *U. S.*, 181 U. S. 283 (1901), holding invalid as repugnant to the Export Clause of the Constitution of the United States (Article I, Section 9, Clause 5) a federal stamp tax or excise upon the privilege of issuing a bill

of lading or entering into a contract of affreightment with a common carrier for carrying exports.

U. S. v. *Hvoslef*, 237 U. S. 1 (1915), holding invalid as repugnant to the Export Clause of the Constitution of the United States (Article 1, Section 9, Clause 5) a federal stamp tax or excise imposed upon the privilege of entering into a charter party for carrying exports.

Thames & Mersey Insurance Co. v. *U. S.*, 237 U. S. 19 (1915), holding invalid as repugnant to the Export Clause of the Constitution of the United States (Article 1, Section 9, Clause 5) a federal stamp tax or excise upon the privilege of entering into a contract of marine insurance insuring a cargo of exports.

2. The fact that the judges of the Court of Appeals of Maryland could, notwithstanding the governing decisions of the Supreme Court cited above and the absence of any decision of the Supreme Court to the contrary, divide upon the question of the validity of such a privilege tax as applied to a railroad's privilege to engage in the importing and exporting process, and the fact that the majority of the Court of Appeals of Maryland could sustain the Maryland statute here assailed, demonstrates the imperative need of an authoritative decision by the Supreme Court of the precise question presented by this appeal, namely, the application of the Import-Export Clause to a state privilege tax upon the precise privilege of a railroad company here involved. The decisions of the Supreme Court interpreting and applying the Import-Export Clause have been relatively few in number and the precise question involved in this appeal has never before been presented to the Supreme Court for decision.

3. The decisions of the Supreme Court cited above, and the fact that the judges of the Court of Appeals of Maryland divided upon the question of the validity of the Mary-

land statute here assailed, demonstrate that those questions involved in this appeal more than meet the test of substantiality announced in *Hamilton* v. *Regents of University of California*, 293 U. S. 245, 258 (1934), namely, that only those questions within the jurisdiction of the Supreme Court are not substantial which are "clearly not debatable and utterly lacking in merit". Unlike the state of the settled law regarding the validity of state vaccination statutes present in *Zucht* v. *King*, 260 U. S. 174 (1922), the existing authorities referred to above clearly support, and no decision of the Supreme Court militates against, appellant's contention that the state statute here assailed contravenes the Import-Export Clause.

4. In *Richfield Oil Corp.* v. *State Board of Equalization*, 329 U. S. 69 (1946), the State of California sought to uphold the state tax there assailed by borrowing, for purposes of interpretation and application of the Import-Export Clause, certain considerations which had been judicially developed in decisions interpreting the Commerce Clause and applying that clause to certain state taxes, and the Supreme Court in that case flatly rejected that technique, because of the differences in wording and meaning between the said two clauses of the Constitution of the United States.

Nevertheless, the Court of Appeals of Maryland in the case at bar expressly held that the Import-Export Clause should not "be given a more prohibitive effect" upon state taxes than the Commerce Clause. It further borrowed the "in lieu tax" principle applied in certain Commerce Clause cases like *U. S. Express Co.* v. *Minnesota*, 223 U. S. 335 (1912), (upholding under the Commerce Clause certain state property taxes imposed upon gross receipts derived from interstate commerce in lieu of non-discriminatory equivalent ad valorem property taxes which might have been imposed upon the property used in interstate com-

merce), to uphold in the case at bar, under the Import-Export clause, a franchise or privilege tax imposed upon the privilege of engaging in the importing and exporting process in lieu of state ad valorem property taxes which, if they had been imposed, would have been less than one-tenth of the amount of the said franchise or privilege tax.

5. This appeal may be decided under the Import-Export Clause alone, but insofar as the Maryland statute here assailed is of questionable validity under the Commerce Clause as well, a resolution by the Supreme Court of that alternative and subordinate question would clearly be timely and of great and important consequence in the interpretation of the Commerce Clause in its application to state privilege taxes. Compare *Freeman* v. *Hewit*, 329 U. S. 249 (1946), and *Interstate Oil Pipeline* v. *Stone*, 337 U. S. 662 (1949).

6. The pecuniary amount of the allegedly invalid tax imposed upon appellant for the year 1947, the taxable year directly involved in this appeal, is $17,648.34 and is substantial. The gross receipts from appellant's operations in the importing and exporting process for the year 1946 claimed to be constitutionally exempt as a measure of the allegedly invalid tax for the year 1947 amounted to over forty-four per cent. of appellant's total gross receipts in that year.

Furthermore, an authoritative decision by the Supreme Court of the questions in this case would determine also as a precedent, the liability or non-liability of appellant for a large amount of such taxes in prior years still open and in later years than the taxable year 1947, and the said liability or non-liability of other railroad companies similarly situated in future years to the State of Maryland and to other states which have imposed similar gross receipts taxes upon

the right of railroads to engage in importation and exportation. It is a subject for judicial notice that railroads are hard-pressed financially, in part by reason of heavy tax burdens, which makes it all the more important and in the public interest that they be relieved of unconstitutional exactions.

G

Cases Sustaining the Jurisdiction

The following cases sustain the jurisdiction of the Supreme Court of the United States of this appeal:

1. Jurisdiction to entertain an appeal from the final decree of a state court where the validity of a state statute was drawn in question as repugnant to the Import-Export Clause of the Constitution of the United States and the decision was in favor of its validity. *Richfield Oil Corp.* v. *State Board of Equalization*, 329 U. S. 69 (1946), *Cook* v. *Pennsylvania*, 97 U. S. 566 (1878), *Crew-Levick Co.* v. *Pennsylvania*, 245 U. S. 292 (1917), *Almy* v. *California*, 24 How. (U. S.) 169 (1860), *Brown* v. *Maryland*, 12 Wheat. 419 (1827), *Empresa Siderurgica* v. *County of Merced*, 337 U. S. 154 (1949).

2. Jurisdiction to entertain an appeal from the final decree of a state court where the validity of a state statute was drawn in question as repugnant to the Commerce Clause of the Constitution of the United States and the decision was in favor of its validity. *Cook* v. *Pennsylvania*, 97 U. S. 566 (1878), *Crew-Levick Co.* v. *Pennsylvania*, 245 U. S. 292 (1917), *Brown* v. *Maryland*, 12 Wheat. 419 (1827), *Puget Sound Stevedoring Co.* v. *Tax Commission*, 302 U. S. 90 (1937), *Freeman* v. *Hewit*, 329 U. S. 249 (1946), *Interstate Oil Pipeline Co.* v. *Stone*, 337 U. S. 662 (1949), *Bush Co.* v. *Maloy*, 267 U. S. 317 (1925).

3. Jurisdiction to entertain this appeal on the ground that the questions sought to be reviewed thereby are substantial. The cases cited in paragraphs 1 and 2 supra and also the following cases—*Hamilton* v. *Regents of University of California*, 293 U. S. 245 (1934), *Hunter* v. *City of Pittsburgh*, 207 U. S. 161 (1907), *Missouri ex rel. Wabash Railway Co.* v. *Public Service Commission*, 273 U. S. 126 (1926), *Offield* v. *N. Y., N. H. & H. Rwy. Co.*, 203 U. S. 372 (1906), *Monterey* v. *Jacks*, 203 U. S. 360 (1906), *Mobile Transportation Co.* v. *Mobile*, 187 U. S. 479 (1903).

Therefore, the appellant, Canton Railroad Company, submits that the Supreme Court of the United States has jurisdiction of this appeal by virtue of U. S. C. Title 28, Section 1257(2).

Respectfully submitted,

JOHN HENRY LEWIN,
VENABLE, BAETJER & HOWARD,
Attorneys for Canton Railroad Company, Appellant.

APPENDIX "A"

OPINION OF THE CIRCUIT COURT NO. 2 OF BALTIMORE CITY

These appeals by the Western Maryland Railway Company and the Canton Railroad Company are based upon the contention set up by the taxpayers that the gross receipts tax assessed under the provisions of Code, Article 81, Sections 94½ to 99 (1943 Supplement), inclusive, are unconstitutional and invalid as applied to the operating revenues of the railroads derived from their import and export business.

This Code provision requires railroads and certain other public utilities to pay an annual tax "as a franchise tax * * * measured by the gross receipts for the preceding calendar year. * * *" Taxable gross receipts are limited to operating revenues derived from business in this State. The tax has been in effect since 1872, but has never been directly passed upon by the Supreme Court of the United States. Our Court of Appeals has held that this tax does not violate the Commerce Clause of the Federal Constitution. (Railroad vs. State, 92 Md. 668, 1901.)

Now for the first time the question is raised as to whether the Import-Export Clause of the Constitution of the United States prevents the State of Maryland from levying this tax on the gross receipts earned by railroads in this State from the transportation of exported and imported goods.

The amount of taxes involved in this controversy is considerable and will be high as long as export traffic remains at its present level. The methods of calculation are not before the court, although it is apparent the actual determination of export-import traffic is difficult, but not impossible, of ascertainment as the railroads keep complete detailed records of shipments.

The railroads filed their returns to the State Tax Commission in due course, but after several recent decisions of the U. S. Supreme Court they filed amended returns seeking to eliminate the gross receipts earned from the transportation of exported coal, grain and miscellaneous commodities, and of imported ores and other freight. The

claim is based upon the Export-Import Clause, Article I, Section 10, Clause 2, of the Constitution of the United States, the taxpayers asserting this clause prohibited such State taxation.

After lengthy hearings the State Tax Commission held the tax was not prohibited by this constitutional provision and these appeals followed.

The Export-Import Clause of the Constitution, Article I, Section 10, Clause 2, is as follows:

> "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws; and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress."

This section of the Constitution is broad and all inclusive with only one exception not relevant here. It prohibits the State from levying any tax on exports or imports and from deriving any revenue from this source. This clause represented a compromise in the Constitutional Convention between those advocating local and those advocating national sovereignty. Its purpose was to end the strife that had characterized the Confederation. Southern States felt they would bear the brunt of imposts on imports if left to individual States for determination, while exporting States felt they would be at a trading disadvantage if other States taxed their products flowing through these States to foreign markets. By Article I, Section 9, of the Constitution, even Congress was placed under a disability to tax exports for fear of discrimination. Congress was given the power to regulate interstate and foreign commerce, but the power to tax exports was taken from the States to prevent coastal States from taxing goods produced inland and sold abroad. (The Federalist, No. 42; Elliot's Debates, 252, 483; 14 U. of C. Law Review, 672.)

Over the years various cases came to the Supreme Court for determination as to whether the different taxes imposed from time to time violated this provision of the Constitution.

These cases range all the way from taxes on foreign bills of lading to taxes upon baseball equipment for foreign shipment. These cases are collected in various law review articles, where they are summarized, and are not repeated here. (See 14 University of Chicago Law Review, 669; 42 Illinois Law Review, 251; 59 Harvard Law Review, 627; 60 Harvard Law Review, 501 and 710.)

Then came the cases of Richfield Oil Corporation vs. State Board of Equalization (1946), 329 U. S. 69, and a short time later Joseph vs. Carter and Weeks Stevedoring Co. (1947), 330 U. S. 422.

The Richfield Oil case involved the validity of the California Retail Sales Tax as applied to the sale of oil for export. Under the California Law it was the duty of the vendor Richfield Oil, to collect the tax from the vendee. In this instance the purchaser was the New Zealand Government. The oil was carried by pipe line from the refinery to storage tanks at the harbor, and then pumped into the hold of the steamer for shipment abroad.

The Supreme Court held that the Import-Export Clause prohibited the imposition of this State Tax on this sale, with the opinion by Mr. Justice Douglas, six Justices concurring, and Mr. Justice Black dissenting. The opinion discusses the Import-Export Clause at some length and pointed out that "any" tax, whether discriminatory or not, is prohibited by the Export-Import Clause. There are no qualifications, and only one minor exception.

In applying this provision of the Constitution to the facts in that case the Supreme Court found that when the oil was delivered into the hold of the vessel "that delivery marked the commencement of the movement of the oil abroad." The process of exporting within the meaning of the Constitution began when the goods actually started their movement in foreign commerce, and then the immunity attaches.

The Joseph case, supra, involved the validity of the New York City gross receipts tax as applied to gross receipts derived from stevedoring. By a five to four decision the Supreme Court held the tax invalid under the commerce clause, but Mr. Justice Douglas (who wrotes the opinion in the Richfield case) dissented, taking the view that the tax did not violate the commerce clause but did violate the Import-Export Clause. The majority did not base their decision on the Import-Export Clause of the Constitution.

In the case of Joy Oil Co. vs. State Tax Commission, decided June 13, 1949, by the Supreme Court, 17 U. S. Law Week, 4508, Mr. Justice Frankfurter, speaking for the majority of the Court, held that a million and a half gallons of gasoline, marked for export, but held in Michigan for fifteen months awaiting adequate transportation facilities, was subject to an *ad valorem* property tax assessed by the City of Dearborn. The Court said, it was not enough "that by the rail shipment to Detroit one step in the process of exportation had been taken * * *. The Export-Import Clause was meant to confer immunity from local taxation upon property being exported, not to relieve property eventually to be exported from its share of the cost of local services."

While it is true the Supreme Court, in Mr. Justice Douglas' opinion in Empresa Siderurgica, S. A. vs. County of Merced, decided May 31, 1949, 17 U. S. Law Week, 4431, held that "the tax immunity runs to the process of exportation and the transactions and documents embraced in it," it is equally true the Court was again passing on the direct tax on the article itself.

The taxpayers urge that Hooven & Allison vs. Evatt, 324 U. S. 652 (1945) is authority for holding that the importing process continues through the rail journey to an inland destination. The Court there held that the hemp in Ohio, ready for use in manufacture, still in its unbroken package, remained an import after the railroad journey was over. Again the Court was dealing with a tax on the article itself.

It is thus seen that the question presented in the Richfield Oil case, Joy Oil Co. case, the Empresa Siderurgica, case and the Hooven and Allison case, involved a tax on the articles themselves because those articles had obtained or retained the characteristics of exports or imports. But that is not the question in this case. Here the issue is whether the Maryland Gross Receipts Tax, as applied to the railroads involved, is a tax on the activity or process of exporting and importing.

In Crew-Levick Co. vs. Pennsylvania, 245 U. S. 292 (1917), the Supreme Court held invalid a gross receipts tax levied against a taxpayer who was actually selling exports. That case established the rule that a gross receipts tax imposed upon the business of selling goods in foreign commerce was, in effect, "a regulation of foreign commerce of an impost upon exports, within the meaning of the pertinent clauses of the Federal Constitution." But the Crew-Levick case did not decide that every non-discriminatory gross receipts tax imposed upon, or which might influence, the export business was invalid, nor did it define, for all purposes, the scope of activities which might be embraced within the concept of the "export business".

It seems obvious that the railroads here involved are not engaged in the exporting or importing business. These carriers do not control the shipments of the products other than to bring them, in certain cases, to the water's edge. Here, unlike the taxpayer in the Crew-Levick case, the railroads are not concerned directly with foreign markets and foreign buyers. While it may be true that the railroads, in part, make possible that other persons may engage in the export-import business, such assistance does not convert the carriers into exporters or importers themselves.

Taking the contention of the railroads in its most favorable light, therefore, it can be seen that they seek to have held invalid the Maryland Gross Receipts Tax because it is imposed not upon the business or process of importing and exporting but upon an activity which merely assists other persons to engage in that business. No Supreme Court case has gone this far, and, in my opinion, the contention is without merit.

The Court holds that the Maryland Gross Receipts Tax is too remote and indirect to be affected by the Export-Import Clause. Goods are in transit on these railroads at all times, but are not in the process of exportation until delivered to the ultimate carrier for shipment abroad. The State tax is not a tax on exports or imports or on the business or process of exporting or importing, but is a tax on the privilege of operating a railroad in the State of Maryland, and is in lieu of certain other taxes. (See State Tax Commission vs. Western Md. Ry., 52 A. 2d, 615.) The tax is not levied on the goods exported or imported, or the proceeds, or the privilege of exporting or importing.

All transportation in some manner affects to some degree exports and imports. The real question is, how much and how direct, and whether there is a close and substantial relationship to exports and imports as to come within the prohibition of the Constitution.

There must at some point be a distinction between the direct and indirect effects of any tax. We must determine what its limit is and what its practical application amounts to.

This clause does not reach all enterprises and transactions which have a remote and indirect effect on exports and imports, otherwise it would embrace every kind of tax. The income tax paid by a railroad in some measure affects exports and imports and is based in some degree on the profits from such traffic. Other taxes paid by railroads of necessity affects exports and imports, but such affect is indirect and remote.

These railroads do not engage in foreign commerce, nor do they control the shipments of the products other than to bring them to other carriers for export or to receive them from other carriers for further transportation inland. To hold that they are engaged in exporting and importing because the merchandise is ultimately actually shipped abroad or received from foreign countries is another way of saying that that which was indirect has become direct.

It appears to me that the Maryland tax is not on the business of importing or exporting and is so remote insofar as its affect on exports and imports or the process of export-

ing or importing as not to be in contravention of the constitutional clause already mentioned.

The decision of the State Tax Commission in each case is sustained.

JOSEPH SHERBOW,
Judge.

Filed: June 24, 1949.

APPENDIX "B"

COURT OF APPEALS OF MARYLAND

No. 76, October Term, 1949—Filed April 19, 1950

(Combined With No. 96)

WESTERN MARYLAND RAILWAY COMPANY

vs.

STATE TAX COMMISSION OF MARYLAND

Argued by W. Harvey Small (Wm. C. Purnell on the brief) for appellant.

Argued by Hall Hammond, Attorney-General, and Harrison L. Winter, Assistant Attorney-General, for appellee.

No. 96, October Term, 1949—Filed April 19, 1950

(Combined With No. 76)

CANTON RAILROAD COMPANY

vs.

JOS. H. A. ROGAN, et al., Etc. Const. the STATE TAX COMMISSION OF MARYLAND

Argued by John Henry Lewin (J. Crossan Cooper, Jr., and Venable, Baetjer & Howard on the brief) for appellant.

Argued by Hall Hammond, Attorney-General, and Harrison L. Winter, Assistant Attorney-General, for appellee.

Two appeals in one record from the Circuit Court No. 2 of Baltimore City. Joseph Sherbow, Judge.

Argued before Marbury, Chief Judge; Delaplaine, Collins, Grason, Henderson and Markell, JJ.

Constitution of United States—Export-Import Clause—Maryland Gross Receipts Tax on Railroads

The railroads contended that the Maryland Gross Receipts Tax was invalid under the export-import clause of the Federal Constitution, as to certain portions of their receipts derived from their services rendered in "the importing and exporting process."

The State contended that the tax based on all gross receipts of the railroads was in lieu of a franchise tax which it could properly levy.

HELD: The tax is not in violation of the export-import clause of the Constitution of the United States.

Affirmed.

COLLINS, *J.*—

These appeals are taken by Western Maryland Railroad Company (Western Maryland) and Canton Railroad Company (Canton), from decrees of Circuit Court No. 2 of Baltimore City sustaining final assessment against the appellants made by the Maryland State Tax Commission (the Commission) for gross receipts taxes imposed by Article 81, Section 95 of the 1943 Supplement of the Code.

In the case of Western Maryland the contested taxes for the years 1946 and 1947 are computed upon its gross receipts within the State of Maryland for the preceding calendar years of 1945 and 1946, respectively. In the case of Canton the contested taxes for the year 1947 were computed upon its "gross receipts for the calendar year 1946" within the State of Maryland. Both appellants claim that certain portions alleged to have been derived from their services rendered in "the importing and exporting process" should not have been included within the total amount of gross receipts subject to the tax. They claim that

Article 1, Section 10, Clause 2, of the Constitution of the United States grants immunity to that portion of the gross receipts.

The pertinent provisions of Article 81, Sections 94½ and 95, 1943 Supplement of the Code follow:

"94½. The phrases 'gross receipts,' 'total receipts,' 'gross earnings,' 'total earnings' and 'all earnings,' as used in Sections 95 to 100, inclusive, mean in the case of railroads and other public service corporations, the operating revenues thereof, without any deductions or credits of any kind whatsoever. When any public service corporation is engaged in more than one class of business and one or more classes thereof is business not subject to the gross receipts tax or subject thereto at different rates, the operating revenues of the class or classes of business subject to such tax at different rates shall be reported separately and taxed at the rate or rates applicable to such class or classes of business. This section shall not be construed as implying that in the absence of this section the requirements of Sections 95 to 100, inclusive, could properly be otherwise construed.

95. (a) A State tax as a franchise tax is hereby levied annually for the year 1930 and subsequent years measured by the gross receipts for the preceding calendar year, of:

(1) All domestic or foreign railroad companies, whose roads are worked by steam, doing business in this State, at the following rates, to wit:

One and one-quarter per centum on the first $1,000 per mile of gross earnings, or on the total earnings if they are less than $1,000 per mile; and

Two per centum on all gross earnings above $1,000 and up to $2,000 per mile; and

Two and one-half per centum on all earnings in excess of $2,000 per mile.

* * * * * * *

(b) If any such railroad company has part of its road in this state and part thereof in another State or States, such company shall return a statement of its gross receipts over its whole line of road, together with a statement of the

whole length of its line and the length of its line in this State, and such company shall pay to the State, at the said rates hereinbefore prescribed upon such proportion of its gross earnings as the length of its line in this State bears to the whole length of its line; and similar statements shall be made by each oil pipe line company, and each sleeping car, parlor car, express or transportation company, telephone or telegraph or cable company, so that the proportion of the said gross earnings of the said companies, respectively, accruing, coming from their business within this State, may be accurately ascertained, or said statement may be made in any other mode satisfactory to and required by the State Tax Commission. The said gross receipts taxes shall be due and payable at the treasury on or before the first day of July in each year.

"(c) Every partnership or individual engaged in any of the above enumerated branches of business in this State shall be subject to the tax imposed by this section and comply with all provisions relating thereto as if such firm or individual were a corporation."

The so-called Import-Export clause of the Constitution of the United States, Article 1, Section 10, Clause 2, follows:

"No State shall, without the consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws; and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress." See The Federalist, No. 42; 3 Elliot's Debates, 483; 14 U. of Chicago Law Review, 672.

The operating revenues claimed by the appellants to be exempt were received for transportation, switching, storage, crane privileges, wharfage and weighing of coal, grain, ores, and other miscellaneous commodities in transit between foreign ports and points within the United States. Appellant (Canton) claims that the tax in question is an occupation tax exacted for the privilege of engaging in the import-export process and therefore unconstitutional. This

Court in a long line of cases has sustained the statutory declaration, supra, that the tax here in question is a franchise tax in lieu of all other State property taxes.

In the case of State vs. Philadelphia, Wilmington and Baltimore Railroad Company, 45 Md. 361, the Court had before it Chapter 234 of the Acts of 1872 which was the predecessor of the present Gross Receipts Tax. This Court said in that case at page 379 in holding the tax constitutional: "Properly speaking, the tax is not imposed upon the gross receipts; they are referred to not as descriptive of the subject to be taxed, but merely as furnishing the basis of ascertaining the amount of tax to be paid. If then it is not a tax upon property, what is it? We say, it is a tax upon the *franchise* of railroad companies, measured by the extent of their business." At page 381 it was said: "Being of opinion, then, that the tax upon gross receipts of railroad companies, imposed by the Act of 1872, is a tax upon the franchise of such companies, and not upon their property, * * * we come to the question whether the defendant corporation is exempt from the payment of said tax?" State vs. B. & O. R. R. Co., 48 Md. 49 (1878); Cumberland vs. Pennsylvania R. R. Co., 92 Md., 668 (1901); State vs. U. S. F. & G. Co., 93 Md. 314 (1901); State vs. Central Trust Co., 106 Md. 268 (1907); Postal Telegraph Cable Co. vs. Harford County, 131 Md. 96 (1917); Rogan vs. Baltimore & Ohio Railroad Co., 188 Md. 44 (1947); State Tax Commission vs. Western Maryland Railway Co., 188 Md. 240, 246 (1947).

Western Maryland makes no contention that this is not an in lieu franchise tax. Canton to sustain its contention that the tax is an occupation tax and not an in lieu franchise tax cites Section 144 of Article 81 of the Code (1947 Supplement) which imposes a general franchise tax on corporations. Section 144 (b) explicitly says that the tax is imposed "for its franchise to be a corporation." Sections 95, supra, and 144 supra, tax different kinds of franchises. The franchise to operate a railroad is of course, different from the ordinary privileges conferred by a franchise to operate as a corporation.

Canton also contends that the tax here in question is not a franchise tax in lieu of property taxes because it is not pro-

portionate in amount to the property taxes to which it would have been liable. Canton bases this argument on the fact that if the ordinary rate of State taxes is applied to the assessed value of its property for the calendar year 1946 its taxes would have been $3,800.00 while its gross receipt taxes for that period amount to $39,092.00. Appellee points out in its brief that when Chapter 965 of the Acts of 1945, (substantially reenacted, except as to rates, by Chapter 677 of the Acts of 1947 and codified as Sections 7 (15), 25 (h), 94½ and 95 of Article 81, 1947, Supplement of the Code), is taken into consideration Canton's ad valorem property tax for the calendar year of 1946, as taxes on operating property, including land, would have been $40,681.00, an amount of $1,000.00 "more than the amount of gross receipt taxes imposed for the gross receipts derived during that calendar year." Nashville C. & St. L. Ry. vs. Browning, 310 U. S. 362, Ohio River & W. R. Co. vs. Dittey, 232 U. S. 576.

Appellant (Canton) states in its brief: "If it were an original proposition, one might well argue that the phrase 'any Imposts or Duties on Imports or Exports' was intended to mean no more than property taxes on goods while they constitute imports or exports, or, at the most, taxes in the nature of a tariff. The construction which the Supreme Court has placed upon these words through the years is to the contrary."

The in lieu franchise tax on apportioned gross income has been held valid under the Commerce Clause of the Constitution because it is not a direct tax on interstate business, not because the tax does not in the end increase the cost of interstate business. Such taxes are held valid because they are in lieu taxes and substitute for a property tax which is constitutional. Maine vs. Grand Trunk Railroad Co., 142 U. S. 217, (1891); U. S. Express Co. vs. Minnesota, 223 U. S. 335, (1912); Cudahy Packing Co. vs. Minnesota, 246 U. S. 450, (1918); Northwestern Life Insurance Co. vs. Wisconsin, 247 U. S. 132, (1918); Great Northern Railway Co. vs. Minnesota, 278 U. S. 503, (1929); Illinois Central Railway Co. vs. Minnesota, 309 U. S. 157, (1940); State Tax Commission vs. Western Maryland Railway Co., 188 Md. 240, supra.

An ad valorem property tax on tangible and intangible personal property both used in and derived from the process of importing and exporting is valid. W. P. & Cincinnati Transport Co. vs. Wheeling, 99 U. S. 273, (1879). Burke vs. Wells, 208 U. S. 14. If such an ad valorem tax is constitutional it certainly appears that a franchise tax in lieu of such direct ad valorem taxes is not barred by the Import-Export Clause. New York, ex rel. Parke, Davis & Co. vs. Roberts, 171 U. S. 658 (1898). People, ex rel. American Soda Fountain Co. vs. Roberts, 158 N. Y. 168 (1899).

Both Canton and Western Maryland contend that this tax measured by the gross receipts for handling articles previously imported or to be exported and in "the importing and exporting process," is prohibited by the Import-Export Clause. Of course, a direct tax on imports and exports such as a license tax on the occupation of importing, a direct tax on sales of imports and exports, a tax on the actual doing of an import business, a direct tax on objects in process of importing or exporting, are constitutionally invalid under the Import-Export Clause. Brown vs. Maryland, 12 Wheat. 419, (1827); Crew Levick Co. vs. Pennsylvania, 245 U. S. 292; Anglo-Chilean Nitrate Sales Corp. vs. Alabama, 288 U. S. 218; Spalding & Bros. vs. Edwards, 262 U. S. 66; Hooven & Allison Co. vs. Evatt, 324 U. S. 652.

The tax here in question is not a direct tax on imports or exports like that of a State stamp tax upon bills of lading for the export of gold and silver; or a federal stamp tax on an export bill of lading for wheat exported; or an ad valorem tax on warehouse receipts issued on account of whiskey physically in a foreign country; or a federal stamp tax on charter parties exclusively for the carriage of cargoes from State ports to foreign countries; or a tax applied against contracts of marine insurance which were held to be an integral part of exportation. Almy vs. California, 65 U. S. 169, (1861); Fairbanks vs. United States, 181 U. S. 283, (1901); Selliger vs. Kentucky, 213 U. S. 200, (1909); United States vs. Hvoslef, 237 U. S. 1, (1915); Thames & Mersey Insurance Co. vs. United States, 237 U. S. 19, (1915).

In W. P. & Cincinnati Transport Company vs. Wheeling, 98 U. S. 273, 25 L. Ed. 412 (1879), supra, the city of Wheeling imposed a personal property tax upon vessels in the amount of $.50 on each $100 of the assessed value thereof. These vessels were used in the import-export traffic. The tax was attacked. The Supreme Court in holding this tax valid and constitutional said in part: "Power to impose taxes for legitimate purposes resides in the States as well as in the United States; but the States cannot, without the consent of Congress, lay any duty of tonnage, nor can they levy any imports or duties on imports or exports except what may be absolutely necessary for executing their inspection laws, as without the consent of Congress they are prohibited from exercising any such power. Outside of those prohibitions the power of the States extends to all objects within their sovereign power, except the means and instruments of the Federal Government. State Tonnage Tax Cases, 12 Wall., 204 (79 U. S., XX, 370)." One of the cases relied on by the Court in that opinion was the Maryland case of Howell vs. State, 3 Gill 14.

In New York ex rel. Burke vs. Wells, 208 U. S. 14, 52 L. Ed. 370 (1908), supra, the City of New York assessed for ad valorem personal property taxes, among other things, the cash on hand and notes owned by a foreign corporation doing business in New York State as importers, which were the proceeds of the sale of imported goods in the unbroken original packages. The Supreme Court of the United States held that those items could be taxed under the New York law as capital employed in business within the State without infringing Article I, Section 10, of the Constitution of the United States, although most of the proceeds of such sales were remitted to the home office of the corporation in Ireland.

In New York, ex rel. Parke, Davis & Co. vs. Roberts, 171 U. S. 658, 43 L. Ed. 323 (1896), supra, it was held that a franchise tax on the amount of the capital stock employed within the State by a foreign corporation conducting a strictly private business is not invalid because a part of its business consists of the importation and sale of articles in original packages. It was contended in that case that this

tax was unconstitutional and invalid under the case of Brown vs. Maryland, supra. In reply to that argument the Supreme Court of the United States said: "But that case is inapplicable. *Here no tax is sought to be imposed directly on imported articles or on their sale.* This is a tax imposed on the business of a corporation, consisting in the storage and distribution of various kinds of goods, some products of their own manufacture and some imported articles. From the very nature of the tax, being laid as a tax upon the franchise of doing business as a corporation, it cannot be affected in any way by the character of the property in which its capital stock is invested." (Italics supplied here.)

As herein stated the contested taxes here are for the years 1946 and 1947. Evidently the appellants rely largely on decisions of the Supreme Court of the United States since and beginning in 1946. Great reliance is placed by appellants on the case of Richfield Oil Corporation vs. State Board, 329 U. S. 69 (1946). The majority opinion was written by Mr. Justice Douglas with Mr. Justice Black dissenting. In that case by statute California levied a retail sales tax on certain oil "measured by the gross receipts of retail sales and levied on retailers 'For the privilege of selling tangible personal property at retail'." The Richfield Oil Corporation contracted with the government of New Zealand for the sale of oil, f.o.b. Los Angeles. Payment was to be made in London. Delivery was made by Richfield by its own pipe lines from its refinery in California to storage tanks at the Los Angeles harbor and pumped directly from the storage tanks into a vessel owned by the New Zealand government, in the harbor of Los Angeles, and consigned to the Naval Officer-in-Charge at Auckland, New Zealand. No portion of the oil was used or consumed in the United States. The Supreme Court of the United States, reversing the California Supreme Court, held that the oil became an export no later than when it was delivered into the vessel and when the passage of title by delivery of the oil into the vessel took place, the oil had become an export. This sales tax was therefore a direct tax upon an export and violated the Import-Export Clause. This case was

very similar to and naturally followed the decision in Crew Levick Co. vs. Pennsylvania, 245 U. S. 292, supra.

Joseph vs. Carter & Weekes Co., 330 U. S. 422 (1947), involved a New York State occupation tax upon stevedoring measured by gross receipts from servicing ships at the port of New York. The goods moved both in interstate and foreign commerce. The majority of the Supreme Court of the United States held that this tax violated the Commerce Clause of the Constitution but made no reference to the Import-Export Clause which was argued to the Court. The majority opinion was written by Mr. Justice Reed, concurred in by the Chief Justice, and Justices Frankfurter, Jackson, and Burton. Mr. Justice Black dissented totally from the majority opinion. Justices Douglas, Rutledge and Murphy dissented on the proposition that the Commerce Clause was violated. Justices Douglas and Rutledge dissented from the invalidity of the tax under the Commerce Clause but were of opinion that it was invalid under the Import-Export Clause. This dissenting opinion was based upon the cases of Thames and Mersey Ins. Co. vs. United States, 237 U. S. 19, supra; Spalding & Bros. vs. Edwards, 262 U. S. 66, supra; Richfield Oil Corp. vs. State Board, 329 U. S. 69, supra. The tax here before us is certainly not comparable under the Import-Export Clause to the following taxes before the Supreme Court in the last three cases cited: A tax applied against a contract of marine insurance which is an integral part of exportation and so vitally connected therewith that a tax on the insurance policies is essentially a tax upon the export; a tax upon baseballs sold by a manufacturer in New York to a firm in Venezuela, marked for delivery to the purchaser in Venezuela and delivered to the carrier as directed by the purchaser; a sales tax upon oil as in the Richfield Oil case, supra.

Joy Oil Company vs. State Tax Commission 337 U. S. 286, (1949) involved a personal property ad valorem tax. The gasoline on which the tax was levied was transported from Grand Rapids to Detroit, Michigan, for export, where it was placed in storage tanks from which it was to be shipped by water to Canada. On account of the inability of the taxpayer to obtain shipping space, the gasoline, except for

50,000 gallons exported, remained in Detroit for about fifteen months. The majority of the Supreme Court of the United States held that while the gasoline was stored in Detroit it did not constitute an export because it might have been used for domestic purposes. Four Justices dissented on the ground that all of the facts indicated that the gasoline would be exported. The minority opinion therefore was based on the fact that this was a direct tax on an export and therefore a violation of the Import-Export Clause. Another case involving an invalid direct tax on articles in export is Empresa Siderurgica, S. A. vs. County of Merced, 337 U. S. 154, (1949). That case is not in point here.

It is argued that the Import-Export Clause should be given a more prohibitive effect than the Commerce clause because of the fact that the former contains an express tax exemption whereas the latter does not. Neither clause literally supports the interpretations that have been put upon them by unchallenged decisions. The commerce clause has been extended by implication to prohibit state exactions regardless of Federal regulation, and the Import-Export clause has been extended to cover not only exactions upon the goods themselves but on the integral parts of exportation. The solution of the problem as to where the line should be drawn can hardly depend on verbalism. We find no case dealing with the precise question now presented. On principle, we see no reason why a franchise tax measured by gross receipts, including receipts, from foreign commerce, should be valid under one clause and not under the other, particularly where the tax is in lieu of other permitted taxes.

Decrees affirmed, with costs.

DELAPLAINE, J., and MARKELL, J., dissent and MARKELL, J., files dissenting opinion in which he is joined by DELAPLAINE, J.

MARKELL, J. (dissents)—

On a federal question our duty is to follow the Supreme Court, not to try to lead it. In the fourth Texas primary case, Smith vs. Allwright, 324 U. S. 649, 652, the court re-

marked that the district court had denied relief and "the Circuit Court of Appeals quite properly affirmed its action on the authority of Grovey vs. Townsend, 295, U. S. 45 [the third Texas primary case]." The court thereupon overruled Grovey vs. Townsend and reversed the action "quite properly" taken by the lower court. We are not at liberty to guess about personalities, changes in personnel, or possible future changes in decisions, or to take the obscurantist attitude that determination of the present status of the authorities amounts to searching into the inscrutable and that we should therefore sustain the tax and let the Supreme Court strike it down if it will. As we have recently said, through Chief Judge Marbury, "If the Supreme Court did not mean what it said or said more than it should, or what it should not have said, the responsibility is its and not ours." Goetz vs. Smith, — Md. — 62A 2d 602, 604. We may, and should compare opinions of the court with dissenting opinions to determine the line of demarcation between them and the scope of the decisions of the court.

Cases under the Import-Export Clause are few in comparison with the multitude under the Commerce Clause. For the first 150 years of the operation of the Constitution the Import-Export Clause, approximately but to a fluctuating degree, covered in the same way part of the same field as the Commerce Clause. Consequently in a case involving the broader field of the Commerce Clause it was seldom necessary to discuss the Import-Export Clause at all. In Crew Levick Co. vs. Commonwealth of Pennsylvania, 245 U. S. 292, 295, in which the court held invalid a gross receipts tax on the business of selling goods in foreign commerce, it was said, "The bare question, then, is whether a state tax imposed upon the business of selling goods in foreign commerce, in so far as it is measured by the gross receipts from merchandise shipped to foreign countries, is in effect a regulation of foreign commerce or an impost upon exports within the meaning of the pertinent clauses of the Federal Constitution. Although dual in form, the question may be treated as a single one, since it is obvious that, for the purposes of this case, an impost upon exports and a regulation of foreign commerce may be re-

garded as interchangeable terms." For the last ten years the field covered by the Import-Export Clause has, to an important extent, included taxes not prohibited by the Commerce Clause. This important difference between the coverage of the two clauses is not due to changes in decisions under the Import-Export Clauses, with which we are here concerned, but to changes in decisions under the Commerce Clause with which fortunately we are not concerned. With one exception (which will now be mentioned but is not now material) there has been from the first no change in the decisions under the Import-Export Clause. In Brown vs. Maryland, 12 Wheat. 419, 449, (1827), it was "supposed" and in Almy vs. California, 24 How. 169, (1861), it was assumed, as the basis of an unanimous opinion, that the Import-Export Clause is applicable to "imports" and "exports" from one state into another. In Woodruff vs. Parham, 8 Wall. 123, (1869), these dicta were discarded and the clause held applicable only to imports from and exports to a foreign country.

On their face the Import-Export Clause and the Commerce Clause suggest two possible differences, (1) the Commerce Clause covers "commerce," the Import-Export Clause "imports" and "exports", which conceivably might be construed as meaning only the goods imported or exported, not the business or process of importation or exportation, (2) the Commerce Clause does not contain any express tax exemption, the Import-Export Clause does. In Brown vs. Maryland, supra, the first case under the Import-Export Clause, the first possible difference was negatived. That clause ever since has been construed as exempting from taxation not only the goods imported or exported, but the business and the process of importation or exportation. The second possible difference was never completely excluded, for about 150 years in a varying degree was almost eliminated, but in the last ten years has been definitely affirmed.

Until 1869 the Import-Export Clause was assumed to give an express tax exemption to transportation in foreign or interstate commerce. In 1873 there were decided State Freight Tax, 15 Wall. 232, and the State Tax on Railway

Gross Receipts, 15 Wall. 284, the former holding invalid a tax on freight, including interstate freight, at graduated rates per ton on different articles, the second sustaining, a Pennsylvania tax on railway gross receipts, including receipts from interstate commerce. The opinions in both cases were delivered by the same justice, but only four justices concurred in both decisions, which were essentially irreconcilable. After repeated subsequent decisions consistent with the State Freight Tax, the State Tax on Railway Gross Receipts was in effect overruled in Philadelphia and Southern Steamship Co. vs. Pennsylvania, 122 U. S. 326, (1887).

Thereafter until about ten years ago it was held that interstate commerce, and specifically gross receipts from such commerce, were exempt from state taxation, with one important but elusive exception, viz., a gross receipts tax, by whatever name called, if it amounts to no more than the ordinary tax upon property or a just equivalent therefor is not unconstitutional. Maine vs. Grand Trunk Railroad Co., 142 U. S. 217 (1891), as explained in Postal Cable Co. vs. Adams, 155 U. S. 688 (1895), and Galveston, Harrisburg and San Antonio Railway Co. vs. Texas, 210 U. S. 217, 227 (1908). Such a permitted tax has been called a commutation tax (210 U. S. 226) and, by counsel in the instant case, an "in lieu" tax. For about ten years, beginning with McGoldrick vs. Berwind-White Coal Mining Co., 309 U. S. 33 (1940), the court has narrowed the effect of the Commerce Clause as prohibiting taxes which burden interstate commerce. The court still holds that, "From the Commerce Clause itself, there comes * * * an abridgment of the state's power to tax within its territorial limits. This has arisen from long-continued judicial interpretation that without congressional action the words themselves of the Commerce Clause forbid undue interferences by the states with interstate commerce [4] and that this rule applies in full force to an unapportioned [5] tax on the gross receipts from interstate business,[6] where the taxes were not in lieu of *ad valorem* taxes on property [7] [Citing cases in footnotes 4, 5, 6 and 7.]" Joseph vs. Carter & Weakes Co., 330 U. S. 422, 427. In the case just quoted a state tax on the gross

receipts of a stevedoring corporation from work on ships engaged in interstate and foreign commerce was held unconstitutional under the Commerce Clause. The statement quoted is appreciably narrower than it might have been before the Berwind-White case.

In Richfield Oil Corporation vs. State Board of Equalization, 329 U. S. 68, decided a few months before the *Joseph* case, the court indicated the change that had occurred in the recent Commerce Clause cases, and, what is more important and, I think, decisive in the instant case, the difference in this respect between the Commerce Clause and the Import-Export Clause. "* * * the Commerce Clause is cast, not in terms of a prohibition against taxes, but in terms of a power on the part of Congress to regulate commerce. It is well established that the Commerce Clause is a limitation upon the power of the States, even in absence of action by Congress. [Citing cases]. But the scope of the limitation has been determined by the Court in an effort to maintain an area of trade free from state interference and at the same time to make interstate commerce pay its way. As recently stated in McGoldrick vs. Berwind-White Coal Mining Co., supra, p. 48, the law under the Commerce Clause has been fashioned by the Court in an effort 'to reconcile competing constitutional demands, that commerce between the states shall not be unduly impeded by state action, and that the power to lay taxes for the support of state government shall not be unduly curtailed.' That accommodation has been made by upholding taxes designed to make interstate commerce bear a fair share of the cost of the local government from which it receives benefits (see *e. g.* Western Live Stock vs. Bureau of Revenue, 303 U. S. 250, 254-255, and cases cited; McGoldrick vs. Berwind-White Coal Mining Co., supra) and by invalidating those which discriminate against interstate commerce, which impose a levy for the privilege of doing it, which place an undue burden on it. [Citing cases]." After thus describing the somewhat tenuous line between taxes which are prohibited and those which are permitted under the Commerce Clause, the court then makes plain that there is no exception at all from the unqualified tax exemption under the Import-Export Clause.

"It seems clear that we cannot write any such qualification in to the Import-Export Clause. It prohibits every State from laying 'any' tax on imports or exports without the consent of Congress. Only one exception is created—'except what may be absolutely necessary for executing its inspection Laws.' The fact of a single exception suggests that no other qualification of the absolute prohibition was intended. It would entail a substantial revision of the Import-Export Clause to substitute for the prohibition against 'any' tax a prohibition against 'any discriminatory' tax. As we shall see, the question as to what is exportation is somewhat entwined with the question as to what is interstate commerce. But the two clauses, though complementary, serve different ends. And the limitations of one cannot be read into the other." 329 U. S. 75-76.

* * * * * * *

"We cannot, therefore, read the prohibition against 'any' tax on exports as containing an implied qualification." 329 U. S. 78. In the *Richfield* case the court held unconstitutional under the Import-Export Clause application of a California gross receipts sales tax to an export shipment.

As a decision under the Import-Export Clause the *Richfield* case is not qualified, but reaffirmed, by the *Joseph* case. In the *Joseph* case, five justices broadened the invalidation of the tax to include interstate commerce as well as imports and exports, seven condemned it as to imports and exports. It is impossible to escape Professor Powell's interpretation of the opinions in this respect. 60 Harvard Law Review 744. Though the majority opinion does not mention the Import-Export Clause it cites the *Crew Levick* case to the very page quoted, *supra*, where the court said the two questions were one. Reason and authority may be surveyed in vain without finding any ground for holding that a tax, invalid under the Commerce Clause, could be valid, as to imports or exports, under the Import-Export Clause.

A tax on gross receipts from carriage of goods is manifestly a tax on exportation. Transportation is not an incident, direct or indirect, of commerce or exportation. It *is* commerce and exportation. The Export Clause (as far as

it goes) is identical in scope with the Import-Export Clause. In Thames & Mersey Ins. Co. vs. United States, 237 U. S. 19, a stamp tax on marine insurance policies on exports was held unconstitutional. The court said, "The rise in rates for insurance as immediately affects exporting as an increase in freight rates, and the taxation of policies insuring cargoes during their transit to foreign ports is as much a burden on exporting as if it were laid on the charter parties, the bills of lading, or the goods themselves. Such taxation does not deal with preliminaries, or with distinct or separable subjects; the tax falls upon the exporting process." 237 U. S. 27. The major premise, that a tax on freight is a tax on exports, was taken as axiomatic.

Under the Commerce Clause, since the recent cases and perhaps before, it may be that the Maryland gross receipts tax is constitutional as an "in lieu" tax. Canton, but not Western Maryland, disputes this proposition on the facts, but the fact question, I think, is not adequately presented on the record. So far as imports and exports are concerned, the question as to the Commerce Clause is immaterial. In the Import-Export Clause "the prohibition against 'any' tax on imports and exports contains no implied qualification." It matters not, therefore, what is the present scope or extent of the "in lieu" qualification or exception to the cases condemning gross receipts taxes under the Commerce Clause. Before the instant cases no question as to the constitutionality of the gross receipts tax under the Import-Export Clause has ever been raised.

I think the tax, as to imports and exports, is unconstitutional and the judgment should be reversed.

Judge Delaplaine authorizes me to say that he concurs in this opinion.

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No. 96

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

CANTON RAILROAD COMPANY, *Appellant*

vs.

JOSEPH H. A. ROGAN, OWEN E. HITCHINS AND WILLIAM W. TRAVERS, CONSTITUTING THE STATE TAX COMMISSION OF MARYLAND,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF MARYLAND

BRIEF FOR APPELLANT

King Bros, Inc., Printers, 208 N. Calvert St., Baltimore, Md.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 96

CANTON RAILROAD COMPANY, *Appellant*

vs.

JOSEPH H. A. ROGAN, OWEN E. HITCHINS AND WILLIAM W. TRAVERS, CONSTITUTING THE STATE TAX COMMISSION OF MARYLAND,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF MARYLAND

BRIEF FOR APPELLANT

OPINIONS BELOW

The opinion of the Court of Appeals of Maryland and the dissenting opinion of two judges thereof (R. 35-50) are reported in 73 A.2d 12.

JURISDICTION

The final decree of the Court of Appeals of Maryland was entered on April 19, 1950 (R. 44). Petition for appeal was presented to the Chief Judge of that court on May 24, 1950, and was allowed the same day (R. 3). The jurisdiction of

this Court is conferred by U.S.C. Title 28, Sec. 1257 (2). Probable jurisdiction was noted on October 9, 1950 (R.53).

STATUTE OF MARYLAND THE VALIDITY OF WHICH IS INVOLVED

The Maryland statute, the validity of which, as construed to impose a "franchise tax" upon Appellant's privilege to engage as a common carrier in the importing and exporting process, by handling and forwarding imports and exports in foreign commerce, and to measure the tax by the gross receipts derived from such commerce, was drawn in question as being repugnant to Article 1, Section 10, Clause 2 (Import-Export Clause) of the Constitution of the United States, and sustained by the decision and decree of the Court of Appeals of Maryland, is Article 81, Sections 94½ and 95 of the Annotated Code of Maryland (1943 Supp.). Article 81, Section 94½ is a codification of Laws of Maryland 1943, Chapter 488, Section 12, page 588. Article 81, Section 95 is a codification of Laws of Maryland 1922, Chapter 351, Section 1, pages 784 and 785, and Laws of Maryland 1941, Chapter 906, Section 6, page 1654.

Article 81, Sections 94½ and 95 of the Annotated Code of Maryland (1943 Supp.) reads, to the extent relevant, as follows:

> "94½. The phrases 'gross receipts', 'total receipts', 'gross earnings', 'total earnings' and 'all earnings', as used in Sections 95 to 100, inclusive, mean in the case of railroads and other public service corporations, the operating revenues thereof, without any deductions or credits of any kind whatsoever. When any public service corporation is engaged in more than one class of business and one or more classes thereof is business not subject to the gross receipts tax or subject thereto at different rates, the operating revenues of the class or classes of business subject to such tax at different rates shall be reported separately and taxed at the rate or rates applicable to such class or

classes of business. This section shall not be construed as implying that in the absence of this section the requirements of Sections 95 to 100, inclusive, could properly be otherwise construed.

"95. (a) A State tax as a franchise tax is hereby levied annaally for the year 1930 and subsequent years measured by the gross receipts for the preceding calendar year, of:

"(1) All domestic or foreign railroad companies whose roads are worked by steam, doing business in this State, at the following rates, to wit:

"One and one-quarter per centum on the first $1,000 per mile of gross earnings, or on the total earnings if they are less than $1,000 per mile; and

"Two per centum on all gross earnings above $1,000 and up to $2,000 per mile; and

"Two and one-half per centum on all earnings in excess of $2,000 per mile.

* * * * * *

"(b) If any such railroad company has part of its road in this State and part thereof in another State or States, such company shall return a statement of its gross receipts over its whole line of road, together with a statement of the whole length of its line and the length of its line in this State, and such company shall pay to the State, at the said rates hereinbefore prescribed upon such proportion of its gross earnings as the length of its line in this State bears to the whole length of its line; and similar statements shall be made by each oil pipe line company, and each sleeping car, parlor car, express or transportation company, telephone or telegraph or cable company, so that the proportion of the said gross earnings of the said companies, respectively, accruing, coming from their business within this State, may be accurately ascertained, or said statement may be made in any other mode satisfactory to and required by the State

Tax Commission. The said gross receipts taxes shall be due and payable at the treasury on or before the first day of July in each year.

"(c) Every partnership or individual engaged in any of the above enumerated branches of business in this State shall be subject to the tax imposed by this section and comply with all provisions relating thereto as if such firm or individual were a corporation."

THE CONSTITUTIONAL PROVISIONS INVOLVED

The Import-Export Clause of the Constitution of the United States (Art. I, Sec. 10, Clause 2) is as follows:

> No State shall, without the consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection laws; and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress.

The Commerce Clause of the Constitution of the United States (Art. I, Sec. 8, Clause 3) is as follows:

> The Congress shall have Power * * *
> To regulate Commerce with foreign Nations, and among the several States and with the Indian Tribes.

STATEMENT OF THE CASE

Appellant is a Maryland corporation, engaged, as a common carrier of freight only, in operating a switching railroad, the lines of which lie wholly within Baltimore City and Baltimore County, in the State of Maryland (R. 17). It also operates a marine terminal in the port of Baltimore and its railroad lines run between said marine terminal and connections with trunk-line railroad carriers serving the port of Baltimore. While its operations are performed

solely within the State of Maryland, Appellant's business of handling, transporting and forwarding freight in transit falls into three classes, namely: (1) intrastate commerce, (2) interstate commerce and, (3) foreign commerce in the importing and exporting process.

The last-mentioned class of Appellant's business consists of receiving from vessels which dock at its marine terminal *imports*, such as ores, wood pulp and sugar, originally consigned from foreign countries to points in inland United States; and, while they are in continuous transit and in their unbroken original packages, Appellant, as the agent of the original consignors or the importer consignees of the goods, and at their request, handles these imports at once at its piers (i.e., weighs them, furnishes crane and wharf privileges, and brief temporary intransit storage), and, either delivers them to trucks at its piers to be carried forward to their original ultimate destinations, or transports them without delay over its railroad lines to points in Baltimore where its lines connect with the trunk line railroads, to which it delivers them to be carried to their original ultimate destinations. Appellant also, as the agent of the original consignors of the goods, receives *exports* from these connecting carriers, which exports have been originally consigned from inland points in the United States to points in foreign countries, and, as the connecting link in their overall transit, transports them to its marine terminal, where these exports are loaded without delay upon vessels bound for their foreign destinations. All of these services are necessary for the continuous transit of the imports and exports which was in contemplation when the goods were originally consigned.

In the year 1946, Appellant derived from all classes of its common carrier business in Maryland gross receipts in the total amount of $1,588,774.48 (R. 18). Of this total, $882,817.27 gross receipts were derived from its operations in intrastate and interstate commerce, and Appellant has not here challenged the Maryland statute in question inso-

far as it lays a "franchise tax" upon its privilege to engage in such intrastate and interstate operations and measures the amount of the tax by the $882,817.27 gross receipts derived therefrom.

But, of this total, $705,957.21 gross receipts were derived solely in return for Appellant's performance of the services of handling and forwarding imports and exports described above (R. 18, 20, 22, 23). And Appellant claims that its franchise or privilege to engage in the business of performing those services was not granted by the State and may not constitutionally be taxed by the State, and that its said gross receipts from such operations in the amount of $705,957.21 may not be included as the measure of the amount of such "franchise tax", and that the statute in question insofar as it purports to do so is unconstitutional.

(a) *Typical examples of Appellant's services performed in the importing and exporting process.*

Appellants services to imports and exports are of five types (R. 22):

(1) Switching, which is railroad transportation over Appellant's lines between Appellant's piers and its connections with connecting railroads;

(2) Storage, which is storing at Appellant's piers, in excess of free time for a few days only while awaiting forwarding instructions and delivery to connecting carriers, goods which have just arrived at the piers from foreign ports;

(3) Crane Privilege, which is the furnishing by the Appellant of a crane at its pier for stevedoring operations in unloading cargoes from vessels into railroad cars for the rest of the shipment immediately upon the arrival of the cargoes from foreign ports;

(4) Wharfage, which is the furnishing by the Appellant of the use of its piers to trucks and lighters which come on or to the piers to accept delivery of goods just arrived from foreign ports; and

(5) Weighing, which is the weighing by the Apellant by means other than cranes, of railroad cars which have been loaded with ore from the holds of vessels just arrived from foreign ports.

Vessels from foreign ports carrying goods originally consigned at point of shipment to various inland points in the United States arrive at Appellant's piers. It is necessary for the goods which are to go forward by rail to be unloaded at once from the vessels at the piers and there reloaded into freight cars, and these freight cars forwarded by Appellant over its lines to connecting carriers to be further transported by them to the original consignment destinations of the shipments. This transportation service by the Appellant is done at its regular tariff rates on file with the Interstate Commerce Commssion, and this service is known as Switching. Actual examples of this switching service, which are agreed to be typical of all of the switching, the operating revenues derived from which are claimed to be exempt, are set forth in the record.

The first example (R. 23-24) of this switching service is a consignment of bales of wood pulp from Sweden to Richmond, Virginia. The vessel docked at the Appellant's pier July 9, 1946. This wood pulp, in the unbroken bales, was forwarded in railroad freight cars toward its original destination over the lines of the Appellant three, four and six days after arrival. This service was performed by Appellant at the request of the original consignor.

The second example of switching (R. 25-26) is a consignment of Russian chrome ore in bulk from Russia to Kendaia, N. Y. The vessel docked at the Appellant's pier August 24, 1946, and this ore, still in bulk, was forwarded toward its original destination in railroad freight cars over the Appellant's lines within four days after the date of arrival. This service was performed by Appellant at the request of the importer.

The third example of switching (R. 26-27) is a consignment of manganese ore in bulk from Durban, South Africa,

to Etna, Pennsylvania. The vessel docked at the Appellant's pier August 7, 1946, and this ore, still in bulk, was forwarded toward its original destination in railroad freight cars over the Appellant's lines within seven days. This service was performed by Appellant at the request of the original consignor.

The fourth example of switching (R. 27) is a consignment of manganese ore from India to Johnstown, Pennsylvania, which the Appellant forwarded toward its original destination over its lines in bulk within four days after the date of arrival. This service was performed by Appellant at the request of the original consignor and importer.

Sometimes the foreign goods are stored by Appellant at its piers for a few days awaiting reshipment by trucks or awaiting instructions for forwarding by rail and, when this is done, Appellant makes a regular charge therefor for each day held in excess of a period of free storage, at rates prescribed by its tariff on file with the Interstate Commerce Commission. This service is known as Storage. The typical example of this service (R. 25), which is claimed to be exempt from taxation, is the storage by the Appellant for a period of less than eleven days of a quantity of sugar, still in its original packages or bags, which had been consigned from Cuba to various inland points in the United States via Appellant's piers. This sugar was stored by the Appellant only during the period that forwarding instructions to final destinations were awaited. This service was performed by Appellant at the request of the original consignor.

Sometimes the transfer of a foreign cargo, or some part of it, from the vessel to the railroad cars at Appellant's piers can be done by means of a crane and, when this is done, Appellant furnishes the crane and makes a regular charge therefor. This service is known as Crane Privilege. An example (R. 25-26) of this service which is typical of the crane service claimed to be exempt, is the crane service rendered by Appellant in the transfer of Russian chrome

ore from vessel to railroad cars which had been shipped from Russia to Kendaia, N.Y. Since this chrome ore was forwarded within four days after the arrival of the vessel at Appellant's pier, it is obvious that this crane service was performed almost immediately after the arrival of the vessel. This service was performed by Appellant at the request of the importer.

The second example of crane privilege (R. 26) is the transfer from vessel to railroad cars of South African manganese ore consigned from Durban, South Africa, to Etna, Pennsylvania. Again, since the cars were forwarded by Appellant within seven days after the arrival of the vessel, this crane service was performed almost immediately after the arrival of the vessel. This service was performed by Appellant at the request of the original consignor.

A third example (R. 27) is the transfer by crane from vessel to railroad cars of manganese ore which had been consigned from India to Johnstown, Pennsylvania, and forwarded within four days after the arrival of the vessel. This service was performed by Appellant at the request of the origina consignor and importer.

The last example of crane privilege (R. 27-28) is the use of the crane in transferring from vessel to lighters in the Baltimore harbor, sand ballast consigned from Europe to the United States War Shipping Administration, the unloading of the vessel into the lighters taking place on the very day of arrival of the vessel. This service was performed by Appellant at the request of the importer.

If some of the bulk cargo can not be transferred from the vessels to the railroad cars by means of a crane, which automatically weighs the freight, the Appellant weighs the railroad cars after they have been loaded from the vessel by other means and makes a regular charge therefor. This service is known as Weighing. The typical example of this service (R. 28) is the weighing by the Appellant of five cars of ore which had been shipped from Brazil and consigned

to the R.F.C. Office of Metals Reserve. The service was performed by Appellant within four days of arrival and at the request of the importer.

If the goods are unloaded from the vessel to the Appellant's piers and then delivered to trucks which come on the piers, or delivered directly to lighters alongside the vessel, for a continuation of the over-all transit, Appellant charges at its tariff rates for this use of its piers. This service is known as Wharfage. The typical examples of this wharfage service (R. 24) are the use of Appellant's pier by trucks in obtaining delivery for further transit of quantities of sugar, still in their original packages or bags, shipped from Cuba and consigned to various inland points in the United States, (the service being performed by Appellant at the request of the original consignor), and the use which was made by lighters in receiving alongside the vessel docked at Appellant's piers, for further shipment, sand ballast consigned from Europe to the United States War Shipping Administration (R. 27-28), the service being performed by Appellant at the request of the importer.

The preceding examples are of Appellant's services in the forwarding of *imports* from foreign countries to their original final destinations. The record contains also (R. 28-29) typical examples of switching or transportation services which Appellant performs in the forwarding of *exports*. The typical examples are shipments of black sheet steel, in the original packages or bundles, consigned on July 22, 1946, and August 1, 1946, respectively, from Vandergrift and Irvin, Pennsylvania, to Canton Docks, Baltimore, for export to South Africa, the original way bills issued at Vandergrift and Irvin, Pennsylvania, being so endorsed. Appellant, at the request of the agent of the original consignors, switched or transported these shipments from its connection with the Pennsylvania Railroad to the vessel at its pier bound for South Africa, which sailed August 7, 1946.

(b) *Maryland taxes to which Appellant is subject*

Even if Appellant should be successful on this appeal, it would still be subject to the "franchise tax" levied by the statute here assailed, insofar as that tax is imposed upon its privilege of engaging in intrastate and interstate commerce. Appellant is also subject to and pays an annual State franchise tax "for its franchise to be a corporation", imposed by a separate statute, Article 81, Section 144 of the Maryland Code (1947 Supp.). It also is subject to an annual State income tax upon net income over and above its railroad operating revenues less related expenses, imposed by Article 81, Sections 230, 233(m) of the Maryland Code (1947 Supp.). It also is subject to and pays substantial annual local ad valorem property taxes upon its operating properties to Baltimore County and Baltimore City, imposed by Article 81, Sections 6(5) and 13 of the Maryland Code (1947 Supp.). Its operating properties are exempted, by Article 81, Section 7(15) of the Maryland Code (1943 Supp.) from the comparatively small property taxes levied generally upon Maryland taxpayers *for State purposes only*.

Thus, if the "franchise tax" here challenged is, as the Court of Appeals characterized it, an "in lieu tax", it is "in lieu" only of a State tax *upon net income* derived from its importing and exporting activities and of that small ad valorem property tax which might otherwise be assessed *for State purposes only* upon the physical properties devoted to its importing and exporting activities (R. 21). The franchise tax measured by gross receipts is not "in lieu" of the heavy annual ad valorem property taxes assessed for local purposes which Appellant must pay in addition.

Except for its franchise right to be a corporation and to operate in corporate form, in return for which Appellant pays the State a separate annual franchise tax, Appellant receives from the State of Maryland no privilege or franchise whatever to operate, or to aid it to operate, in foreign commerce. Its railroad lines and other operating facilities

cross or occupy no State property, but lie exclusively upon Appellant's own private property, except to the extent that its railroad crosses four streets owned by the City of Baltimore,—and for this crossing privilege, derived not from the State, but from the City of Baltimore, Appellant separately compensates the City.

(c) *The proceedings below*

In 1947, pursuant to Art. 81, Sec. 96 of the Maryland Code (1939 Edition), Appellant reported to the State Tax Commission of Maryland (hereinafter referred to as "Commission") that Appellant's total gross receipts derived from its railroad business in the State of Maryland during the previous year 1946 amounted to $1,588,774.48, and duly claimed in its reports and in letters to the Commission, citing pertinent authorities, that of these total gross receipts $705,957.21 had been derived by Appellant from that class of its business constituting foreign commerce and the importing and exporting process described above, and that the same were constitutionally exempt and immune from taxation and could not be included as the measure of a State franchise or privilege tax sought to be imposed on such activities, and that no such State franchise or privilege tax could validly be imposed on the privilege of engaging in such activities, by reason of the provisions of Artcle 1, Section 10, Clause 2 of the Constitution of the United States (Import-Export Clause) (R. 18-19).

Notwithstanding said claim, the Commission in December, 1947, imposed upon Appellant, under Art. 81, Sec. 95 of the Maryland Code (1943 Supp.), a tentative assessment amounting to $1,588,774.48 and computed thereon a tentative franchise or privilege tax for the year 1947 amounting to $39,092.34 (R. 19).

Thereupon Appellant duly and timely applied to the Commission for a reduction of said tentative assessment in an amount equal to its gross receipts derived solely from

its operations in foreign commerce and the importing and exporting process, again claming that the tentative assessment, insofar as it included such gross receipts, and that a franchise or privilege tax measured by such gross receipts, would contravene the said Import-Export Clause of the Constitution of the United States (R. 19). This application for exemption of such gross receipts would, if recognized, have reduced the said assessment by $705,957.21, to an assessment of $882,817.27, and the said franchise or privilege tax by $17,648.34 to a tax of $21,440.00.

At a formal hearing on said application before the Commission, Appellant offered factual evidence supporting its application, including detailed evidence showing that that portion of the franchise or privilege tax for 1947, as calculated by the Commission, imposed upon its privilege to engage in foreign commerce and the importing and exporting process, was over ten times greater in amount than a non-discriminatory ad valorem property tax *for State purposes only* would be, if the assessed value of Appellant's properties utilized in its importing and exporting operations should be taxed at the same ad valorem rate applicable generally to the property of other taxpayers in the State (R. 21).

Following said hearing the Commission on March 24, 1948, passed an order that Appellant's gross receipts tax for the year 1947 as tentatively assessed was "constitutional" and its "protest is disallowed" and entered a final assessment against Appellant amounting to its total gross receipts, or $1,588,774.48, including gross receipts of $705,957.21 derived by Appellant solely from its operations in foreign commerce and the importing and exporting process (R. 29-30).

On April 19, 1948, Appellant duly and timely, pursuant to Art. 81, Sec. 194(b) of the Maryland Code (1947 Supp.), appealed from said order and final assessment to the Circuit Court No. 2 of Baltimore City, a state equity court of

first instance having statutory jurisdiction in the premises to review judicially said assessment and order of the Commission and correct the same for errors of law only. In its petition of appeal to said Court and at the trial of the issues of law therein, Appellant contended that the assessment appealed from, insofar as it included therein $705,957.21 gross receipts derived by Appellant solely from its operations in foreign commerce and the importing and exporting process, and that the franchise or privilege tax amounting to $17,648.34 which was imposed upon Appellant's privilege to engage in foreign commerce and the importing and exporting process, contravened Article 1, Section 10, Clause 2 of the Constitution of the United States (Import-Export Clause) (R. 30). Appellant prayed said Court to issue a decree holding and declaring that the provisions of Article 81, Sections 94½ and 95 of the Annotated Code of Maryland (1943 Supp.) were unconstitutional and invalid as applied to Appellant's privilege to engage in foreign commerce and the importing and exporting process and to its gross receipts derived solely therefrom.

On June 29, 1949, the Circuit Court No. 2 of Baltimore City, decided that the said statute was valid and not unconstitutional and entered its decree "that the decision of the State Tax Commission of Maryland to include in the measurement of the Petitioner's gross receipts tax for the year 1947 receipts derived from the transportation of goods consigned for importation or destined for exportation, be and the same is hereby sustained" (R. 31).

On June 30, 1949, Appellant duly and timely, pursuant to Art. 81, Sec. 194(b) of the Maryland Code (1947 Supp.), as amended by 1949 Laws of Maryland, Chapter 413, entered an appeal to the Court of Appeals of Maryland, which is the highest court in the State of Maryland in which a decision could be had, from the said decree of the Circuit Court No. 2 of Baltimore City dated June 29, 1949. On such appeal there was drawn in question by the Appellant the validity of the statute of the State of Maryland

(namely, Annotated Code of Maryland, 1943 Supplement, Article 81, Sections 94½ and 95), on the ground of its being repugnant to Article 1, Section 10, Clause 2 of the Constitution of the United States (Import-Export Clause). The record of the case in the Court of Appeals of Maryland consisted of a Statement of the Case prepared and signed by all the parties to the case with the approval of the lower court, as authorized by Rule 22 of the Court of Appeals of Maryland, showing how the questions in the case arose and were decided below. The decision and final decree in this case entered by the Court of Appeals of Maryland on April 19, 1950 (two judges dissenting), was in favor of the validity of said statute.

(d) *The decision of the Court of Appeals*

In analyzing the holdings of the Court of Appeals, as expressed in its opinion (R. 35-44), we start with the proposition that the Court impliedly found that the articles which Appellant handled and transported were, in fact and in law, imports and exports at the time they were so handled and forwarded. The Court said, "The operating revenues claimed by the appellants to be exempt were received for transportation, switching, storage, crane privileges, wharfage and weighing of coal, grain, ores and other miscellaneous commodities *in transit between foreign ports and points within the United States*" (R. 38); and the whole opinion proceeds on the assumption that this freight constituted imports and exports. There is the further underlying implication that, in the Court's opinion, Appellant's services in question,—necessary to the continued unbroken transportation of these imports and exports, were *part of the importing and exporting process.*

Again, there is the further holding that the whole tax, a separable part of which is here challenged, is a franchise tax imposed, not on the franchise or privilege to be a corporation or to operate in corporate form, but on, and in return

for, the franchise or privilege *to operate a railroad*, including the franchise or privilege to engage in the importing or exporting process. On this point the Court said (R. 38):

> "This Court in a long line of cases has sustained the statutory declaration, supra, that the tax here in question is a franchise tax in lieu of * * other State property taxes."

The Court then quoted with approval from *State v. Philadelphia, Wilmington and Baltimore Railroad Co.*, 45 Md. 361, 379, 381 that "the tax is not imposed upon the gross receipts * * * it is a tax upon the franchise upon railroad companies, measured by the extent of their business," it "is a tax upon the franchise of such companies, not upon their property" (R. 38).

It then distinguished this particular franchise tax from the separate and distinct tax on the franchise "to be a corporation", imposed by Maryland Code, Art. 81, Sec. 144, saying, "The franchise to operate a railroad is of course, different from the ordinary privileges conferred by a franchise to operate as a corporation" (R. 38-39).

Furthermore, in explaining the nature of the tax the Court of Appeals (R. 38) cited its former decision in *State v. Baltimore & Ohio Railroad Co.*, 48 Md. 49 (1878) which flatly holds that only those gross receipts which are derived from the exercise of the taxed franchise or privilege are to be included as the measure of the tax, a decision which negatives any possible construction of the statute that it imposes a tax only on the intrastate privilege though attempting to measure the same by total gross receipts including those from interstate and foreign commerce.

In spite of its conclusions, (1) that Appellant was engaged in the importing and exporting process and (2) that that portion of the tax here assailed is a franchise tax exacted for the privilege of engaging in that process, the Court of Appeals, nevertheless held the tax valid. It apparently arrived at this holding upon the following grounds:

(1) The Court of Appeals apparently thought that, because this franchise or privilege tax was levied in the place and stead of an ad valorem tax *for State purposes* upon the property of Appellant, it could not offend the Import-Export Clause and the Commerce Clause. Furthermore, the Court arrived at this conclusion, even though it recognized that such ad valorem property tax for State purposes, for which the franchise tax was substituted, if it were levied in a non-discriminatory fashion upon Appellant at the same rate applicable to other taxpayers, would be less in amount than one-tenth of the so-called "in lieu franchise tax".

To support these propositions the Court of Appeals relied (R. 39) upon *United States Express Co. v. Minnesota*, 223 U. S. 335 (1912); *Cudahy Packing Co. v. Minnesota*, 246 U. S. 450 (1918); *Great Northern Railway Co. v. Minnesota*, 278 U. S. 503 (1929); *Illinois Central Railway Co. v. Minnesota*, 309 U. S. 157 (1940); *Maine v. Grand Trunk Railroad Co.*, 142 U. S. 217 (1891) and *Northwestern Life Insurance Co. v. Wisconsin*, 247 U. S. 132 (1918). It is submitted, however, that the Court misapprehended the effect of these decisions. It overlooked entirely that the Minnesota taxes which were upheld in the *United States Express Co.; Cudahy Packing Co., Great Northern Railway Co.* and *Illinois Central Railway Co.* cases, because they were imposed in lieu of state ad valorem taxes upon the property of those companies used in interstate commerce, *were themselves property taxes* upon gross receipts derived from such commerce and not franchise or privilege taxes upon the right to engage in such commerce. The Court overlooked the fact that the tax upheld in *Maine v. Grand Trunk Railroad Co.*, though it has been explained as an "in lieu tax" in *Galveston, Harrisburg and San Antonio Railroad Co. v. Texas*, 210 U. S. 217 (1908) imposed a franchise tax *solely upon the privilege of engaging in intrastate commerce* though apportioned gross receipts from interstate commerce were included in the measure of the tax. The *Maine* case has recently been explained on this ground in *Central Greyhound Lines v.*

Mealey, 334 U. S. 653, 658-9 (1948); *Interstate Pipe Line Co. v. Stone*, 337 U. S. 662, 680-1 (1949); and *Joseph v. Carter & Weekes Stevedoring Co.*, 330 U. S. 422, 435 (1947). The Court also overlooked the fact that the franchise or license tax upheld in *Northwestern Life Insurance Co. v. Wisconsin* was not a franchise or license tax upon interstate commerce, because interstate insurance business at that time was legally not commerce in any sense under the then prevailing doctrine of *Paul v. Virginia*, 8 Wall. 168 (1868). (State license taxes upon the insurance business since *United States v. Southeastern Underwriters Ass'n*, 322 U. S. 533 (1944), depend upon express provisions of the McCarran Act. See *Prudential Ins. Co. v. Benjamin*, 328 U. S. 408 (1946); *Robertson v. California*, 328 U. S. 440 (1946)). Thus, the decisions which the Court of Appeals relied on to validate the Maryland franchise tax on the ground that it was imposed in lieu of property taxes, stand *only* for the proposition that state taxes imposed in lieu of ad valorem property taxes upon property used in interstate commerce are valid, provided (1) they are themselves property taxes upon gross receipts and not taxes for the privilege of engaging in interstate or foreign commerce, and (2) they yield no more than "a just equivalent" for ordinary property taxes.

(2) The Court of Appeals summarily brushed aside *Richfield Oil Corp. v. State Board of Equalization*, 329 U. S. 69 (1946), *Joseph v. Carter & Weekes Stevedoring Co.* 330 U. S. 422 (1947), *Almy v. California*, 65 U. S. 169 (1860), *Fairbank v. U. S.* 181 U. S. 283 (1901), *U. S. v. Hvostef* 237 U. S. 1 (1915) and *Thames & Mersey Insurance Company v. U. S.* 237 U. S. 19 (1915) as inapplicable to the Maryland tax on the privilege of handling and forwarding imports and exports in foreign commerce.

With regard to the *Richfield Oil Corp.* case, the Court simply said (R. 42,-43): "This sales tax was therefore a direct tax upon an export and violated the Import-Export

Clause. * * * The tax here before us is certainly not comparable under the Import-Export Clause to * * * a sales tax upon oil as in the *Richfield Oil Corp* case, supra." The supposed distinction was not further explained, and the strong point of resemblance between the tax held invalid in the *Richfield Oil Corp.* case and the tax assailed in the case at bar, namely, that both were privilege taxes upon the process of importing and exporting, went unnoticed.

With regard to *Joseph v. Carter & Weekes Stevedoring Co.*, the Court of Appeals made no attempt to distinguish the activities of stevedores of imports and exports from the activities of Appellant in handling and transporting imports and exports, but merely noticed that the majority opinion of this Court had held the New York occupation tax as applied to stevedoring invalid under the Commerce Clause, and that only Justices Douglas and Rutledge rested their concurrence upon the Import-Export Clause (R. 42-43).

The Court of Appeals made no mention of *Cook v. Pennsylvania*, 97 U. S. 566 (1878), but with regard to *Almy v. California*, *Fairbank v. U. S.*, *U. S. v. Hvoslef* and *Thames & Mersey Insurance Company v. U. S.*, supra, contented itself with saying (R. 40, 43):

> "The tax here in question is not a direct tax on imports or exports like that of a State stamp tax upon bills of lading for the export of gold and silver; or a federal stamp tax on an export bill of lading for wheat exported; * * * or a federal stamp tax on charter parties exclusively for the carriage of cargoes from State ports to foreign countries; or a tax applied against contracts of marine insurance which were held to be an integral part of exportation. * * *
>
> "The tax here before us is certainly not comparable under the Import-Export Clause to * * * a tax applied against a contract of marine insurance which is an integral part of exportation and so vitally connected therewith that a tax on the insurance policies is essentially a tax upon the export."

Here again, the supposed distinction between these invalid state and federal taxes and the Maryland franchise or privilege tax upon the importing and exporting process is not elucidated, except to the extent that the Court of Appeals seems to consider that these invalidated taxes were "direct taxes on imports or exports". They were certainly not property taxes, but every one of them was a tax sought to be imposed upon a privilege, and the Court of Appeals does not attempt to explain away this controlling feature of similarity between those invalid taxes and the tax questioned in the case at bar.

(3) The Court of Appeals also held that the Maryland franchise or privilege tax upon the importing and exporting process was not repugnant to the Commerce Clause. In so doing, the Court ignored the settled law, and the long line of decisions of which *Freeman v. Hewit*, 329 U. S. 249 (1946), is representative, that a State may not levy a tax in return for the privilege of engaging in interstate and foreign commerce. The Court of Appeals then proceeded to hold further (R. 43-44) that the Import-Export Clause should not "be given a more prohibitive effect" upon state taxes than the Commerce Clause. On this point the Court said (R. 44): "On principle, we see no reason why a franchise tax measured by gross receipts, including receipts from foreign commerce, should be valid under one clause (Commerce Clause) and not under the other (Import-Export Clause), particularly where the tax is in lieu of other permitted taxes." In making this last holding the Court of Appeals gave no effect whatever to the fact that the Import-Export Clause, by its terms, outlaws "any" State tax on imports or exports, except what may be absolutely necessary for executing a State's inspection laws, clear distinction between the Import-Export Clause on the one hand and the Commerce Clause on the other, a distinction which was emphasized by this Court in *Richfield Oil Corp. v. State Board of Equalization*, 329 U. S. 69 (1946).

SPECIFICATION OF ERRORS TO BE URGED

Appellant specifies as errors to be urged all of the errors set forth in its Assignment of Errors (R. 4-11), which may be more briefly stated as follows:

The Court of Appeals erred:

(1) In holding that the statute in question, insofar as it is applied to impose a franchise or privilege tax upon Appellant's privilege to engage in the business of handling and transporting imports and exports, and measures the amount thereof by the gross receipts derived from said commerce, is not repugnant to the Import-Export Clause and the Commerce Clause of the Constitution;

(2) In so holding, because the said franchise or privilege tax was imposed as a "in lieu franchise tax" in the place and stead of certain ad valorem property taxes for State purposes;

(3) In holding that, because the State might validly impose a non-discriminatory ad valorem property tax for state purposes upon the property of Appellant used in the importing and exporting process, it could constitutionally impose, in the place and stead thereof, a franchise or privilege tax upon Appellant's privilege of engaging in such process, and measure the tax by the gross receipts derived from Appellant's activities in such process;

(4) In so holding, although the amount of such substituted franchise tax is over ten times greater than a non-discriminatory ad valorem property tax for State purposes;

(5) In holding that the State might validly and constitutionally discriminate against Appellant, and against the foreign commerce in which it is engaged, by imposing, if it should choose to do so, a constitutionally valid ad valorem property tax for State purposes upon the property of Appellant employed in foreign commerce and in the importing and exporting process which would be over ten times

greater than the ad valorem property tax imposed for State purposes upon the property of other taxpayers; and that, on this erroneous premise, the State could validly and constitutionally impose, in the place and stead of such discriminatory property tax, a franchise or privilege tax of the same magnitude upon Appellant's privilege of engaging in the importing and exporting process;

(6) In holding that *United States Express Co. v. Minnesota*, 223 U. S. 335 (1912); *Cudahy Packing Co. v. Minnesota*, 246 U. S. 450 (1918); *Great Northern Railway Co. v. Minnesota*, 278 U. S. 503 (1929); *Illinois Central Railway Co. v. Minnesota*, 309 U. S. 157 (1940); *Maine v. Grand Trunk Railroad Co.*, 142 U. S. 217 (1891) and *Northwestern Life Insurance Co. v. Wisconsin*, 247 U. S. 132 (1918) are authority for the proposition that a franchise tax upon the privilege of engaging in interstate commerce, measured by the gross receipts derived therefrom, may validly be imposed in lieu of, or as a substitute for, an ad valorem property tax upon the property used in such interstate commerce;

(7) In holding that "the tax here is question is not a direct tax on imports or exports like that of a State stamp tax upon bills of lading for the export of gold or silver; or a Federal stamp tax on an export bill of lading for wheat exported * * *; or a Federal stamp tax on charter parties exclusively for the carriage of cargoes from State ports to foreign countries; or a tax applied against contracts of marine insurance, which were held to be an integral part of exports";

(8) In holding that the State franchise tax in question "is certainly not comparable under the Import-Export Clause to" the stamp tax or excise laid upon the privilege of entering into a contract of insurance insuring a cargo of exports held invalid in *Thames and Mersey Insurance Company v. U. S.*, 237 U. S. 19 (1915), or the sales tax levied expressly "for the privilege of selling" exported

gasoline held invalid in *Richfield Oil Corp. v. State Board of Equalization*, 329 U. S. 69 (1946);

(9) In holding that the California state tax held invalid in *Richfield Oil Corp. v. State Board of Equalization*, 329 U. S. 69, as repugnant to the Import-Export Clause was "a direct tax upon an export", or more of a direct tax upon an export than the franchise tax here in question;

(10) In holding that the Import-Export Clause should not "be given a more prohibitive effect" upon State taxes than the Commerce Clause;

(11) In holding that there is "no reason why a franchise tax measured by gross receipts, including receipts from foreign commerce, should be valid under one clause (Commerce Clause) and not under the other (Import-Export Clause), particularly where the tax is in lieu of other permitted taxes".

SUMMARY OF ARGUMENT

I.

As a matter of Maryland law, that part of the gross receipts tax here assailed (i. e., that portion of the tax which is measured by the gross receipts derived by Appellant from the handling and transporting of imports and exports in foreign commerce) is not a property tax, either upon the franchise regarded as property, or upon the gross receipts themselves, or upon the physical properties of Appellant employed in the business. It is a franchise or privilege tax sought to be exacted by the State as a *quid pro quo* for the assumed granting by the State of a privilege. The whole gross receipts tax has been judicially determined to be a franchise or privilege tax exacted for the privilege of operating a railroad. See decision below and *State v. Philadelphia, Wilmington and Baltimore Railroad Co.*, 45 Md. 361 (1876). This franchise tax is laid

upon railroad operating partnerships and individuals as well as upon railroad corporations; therefore, the privilege for which this gross receipts tax is exacted is not the franchise or privilege to be a corporation or to operate in corporate form. That corporate privilege is separately taxed by a different statute.

But Appellant's privilege of operating a railroad is a bundle of separable privileges, namely (1) the privilege of operating in intrastate commerce; (2) the privilege of operating in interstate commerce; and (3) the privilege of operating in foreign commerce and in the importing and exporting process. And the whole gross receipts tax is likewise separable. That part of the tax which is measured by the intrastate gross receipts is laid on the privilege of operating in intrastate commerce. That part of the tax which is measured by the interstate gross receipts is laid on the privilege of operating in interstate commerce. That part of the tax which is measured by the gross receipts from foreign commerce and the handling and forwarding of imports and exports is laid on the privilege of operating in foreign commerce and of handling and transporting imports and exports. Thus, the whole tax, measured by the total gross receipts, and that part thereof here challenged, are not laid on the privilege of engaging in intrastate commerce or upon any other purely local or State conferred privilege.

The above interpretation of the Maryland statute follows from the holding of the Court of Appeals in the present case and from *State v. Baltimore & Ohio Railroad Co.*, 48 Md. 49 (1878), and also from the express wording of Section 94½ of Article 81 of the Maryland Code, which was added to the statute in 1943, in order to make the separability feature of the gross receipts tax, and the matching of the gross receipts derived from the taxed privilege against the privilege on which the tax is laid, abundantly clear.

Therefore, that portion of the gross receipts tax here claimed to be unconstitutional is, as a matter of State law, a State privilege tax exacted for Appellant's privilege of engaging in foreign commerce and in the importing and exporting process—a privilege which the State cannot grant or withhold.

II.

The gross receipts which Appellant claims to be exempt and constitutionally immune from use as the measure of that portion of the tax here challenged were derived by Appellant from its activities in the importing and exporting process. The freight coming from foreign countries which Appellant handled and forwarded were then clearly imports—see, *Hooven & Allison v. Evatt*, 324 U. S. 652 (1945). They were then in continuous unbroken transit, in accordance with their original consignments, from foreign ports to their intended ultimate destinations at points in the United States, and they were in their unbroken original packages. Likewise, the freight destined from points in this country to foreign ports which Appellant handled and forwarded were then clearly exports—see, *Coe v. Errol*, 116 U. S. 517 (1886).

Appellant's services to these imports and exports were performed without delay, before the importing and exporting process had ended, and were necessary and indispensable to the importing and exporting of this freight. They were performed at the request, and for the account, of the original consignors, consignees, importers and exporters. Accordingly, these services constituted foreign commerce and were part and parcel of the importing and exporting process.

Surely Appellant's activities with regard to these imports and exports were more clearly foreign commerce and more clearly part and parcel of the importing and exporting process that were: (1) the activities of a stevedore in

loading imports and exports—see, *Puget Sound Stevedoring Co. v. Commission*, 302 U. S. 90 (1937); *Joseph v Carter & Weekes Stevedoring Co.*, 330 U. S. 422 (1947); (2) the activities of an auctioneer in aiding in the sale of imports—see, *Cook v. Pennsylvania*, 97 U. S. 566 (1878); (3) the activities of an agent for a common carrier in issuing a railroad bill of lading covering exports—see, *Fairbank v. U. S.*, 181 U. S. 283 (1901); (4) the activities of an agent of a common carrier in issuing a water bill of lading covering exports—see *Almy v. California*, 24 How. (U. S.) 169 (1860); (5) the activities of a shipbroker in entering into a charter party for carrying exports—see *U. S. v. Hvoslef*, 237 U. S. 1 (1915); and (6) the activities of a marine insurance company in entering into a contract of marine insurance covering a cargo of exports—see *Thames & Mersey Insurance Co. v. U. S.*, 237 U. S. 19 (1915).

III.

If the propositions outlined in I and II of this Summary are sound, it would appear that, under the applicable and controlling decisions of this Court, that portion of the franchise tax here assailed clearly contravenes the Import-Export Clause of the Constitution. That clause in terms forbids "*any*" State tax upon imports and exports *with only one exception which is here inapplicable*. It has long been construed to forbid State taxes upon the process of importing and exporting, as well as upon the imports and exports themselves. See *Richfield Oil Corp. v. State Board of Equalization*, 329 U. S. 69 (1946) (selling privilege); *Crew-Levick Co. v. Pennsylvania*, 245 U. S. 292 (1917) (selling privilege); *Brown v. Maryland*, 12 Wheat. (U. S.) 419 (1827) (selling privilege); *Cook v. Pennsylvania*, 97 U. S. 566 (1878) (auctioneering privilege); *Almy v. California*, 24 How. (U. S.) 169 (1860) (privilege of issuing an export bill of lading). See also *Joseph v. Carter & Weeks Stevedoring Co.*, 330 U. S. 422 (1947) (Concurring Opinion-stevedoring privilege). *Puget Sound Stevedoring Co. v. Commis-*

sion, 302 U. S. 90 (1937) (stevedoring privilege). See also, under the Export Clause, *Fairbank v. United States*, 181 U. S. 283 (1901) (privilege of issuing a railroad bill of lading for exports); *United States v. Hvoslef* 237 U. S. 1 (1915) (privilege of entering into a charter party for exports); *Thames & Mersey Insurance Co. v. United States*, 237 U. S. 19 (1915) (privilege of entering into a contract of marine insurance on exports).

It is submitted that the fact that this franchise tax is an "in lieu tax", i.e. imposed in lieu of, or in the place and stead of, an ad valorem property tax upon Appellant's physical properties for State purposes only, does not save it. The prohibition against "any" tax includes the prohibition against any tax, in lieu or otherwise.

While perhaps less clearly so, in view of the contrariety of views expressed in *Interstate Pipe Line Co. v. Stone* 337 U. S. 662 (1949), this franchise tax upon the privilege of engaging in foreign commerce is, we submit, equally repugnant to the Commerce Clause. No valid argument can be made, in view of the statute and of the Maryland decisions construing it, that the sole incidence of this gross receipts tax is the privilege of engaging in intrastate commerce or any other local activity, and that the foreign commerce gross receipts merely measure part of the tax upon such local privileges. This statute will not bear the construction placed upon the Mississippi statute in *Memphis Gas Co. v. Stone*, 335 U. S. 80 (1948). It is completely unlike the tax in *International Harvester Co. v. Evatt* 329 U. S. 416 (1947). It is completely unlike the tax "laid for the privilege of using" the State's highways in *Aero Transit Co. v. Comm'rs*, 332 U. S. 495 (1947). The privilege which is the incidence of the separable tax here is the right to engage in foreign commerce. Such right is not granted by the State and cannot be withheld by the State. The burden of the tax on foreign commerce is direct and therefore invalid.

See *Freeman v. Hewit*, 329 U. S. 249 (1946); *Joseph v. Carter & Weeks Stevedoring Co.*, 330 U. S. 422 (1947);

Puget Sound Stevedoring Co. v. Commission, 302 U. S. 90 (1937); *Gwin, White & Prince, Inc. v. Henneford*, 305 U. S. 434 (1938); *Helson and Randolph v. Kentucky*, 279 U. S. 245 (1929); *Leloup v Mobile*, 127 U. S. 640 (1888); *Philadelphia & Southern Steamship Co. v. Pennsylvania*, 122 U. S. 326 (1887); *Galveston, Harrisburg & San Antonio Railroad Co. v. Texas*, 210 U. S. 217 (1908); *Cooney v. Mountain States T. & T. Co.*, 294 U. S. 384 (1935); *Fisher's Blend Station v. Commission*, 297 U. S. 650 (1936).

And the fact that the tax is an "in lieu tax" will not save it from condemnation under the Commerce Clause either. The "in lieu tax" cases, namely, *United States Express Co. v. Minnesota*, 223 U. S. 335 (1912); *Cudahy Packing Co. v. Minnesota* 264 U. S. 450 (1918); *Great Northern Railway Co. v. Minnesota*, 278 U. S. 503 (1929); *Illinois Central Railroad Co. v. Minnesota*, 309 U. S. 157 (1940); *Maine v. Grand Trunk Railroad Co.*, 142 U. S. 217 (1881) and *Northwestern Life Insurance Co. v. Wisconsin*, 247 U. S. 132 (1918) are inapplicable for two reasons: (1) this is not a property tax upon gross receipts or a franchise tax upon a local State conferred privilege, as were the taxes in those cases, but a franchise tax upon the privilege of engaging in foreign commerce, and (2) the amount of this tax is not a "just equivalent" of, but is over ten times greater than, the ordinary ad valorem taxes, imposed, for State purposes only, upon other taxpayers.

ARGUMENT

I

As a Matter of State Law that Portion of the Tax Here Challenged is a Separable Tax Levied in Return for the Privilege of Engaging in Foreign Commerce and Importing and Exporting Process.

The present statute itself calls the tax (which is levied on corporations, partnerships and individuals alike) "a franchise tax * * * measured by the gross receipts", and this description has been in all the predecessor statutes since the

Acts of 1886, Chapter 120. This is more than a mere formal label. That it is a matter of substance appears from the Maryland decisions. They clearly show that the tax is not a property tax levied on a franchise as property, or on the gross receipts themselves, or on the property used in earning the gross receipts. The tax is held to be a tax imposed "in return" for privileges to operate a railroad.

For example, in *State v. P. W. & B. Railroad Co.*, 45 Md. 361 (1876), the Court of Appeals held that the original gross receipts tax law, Acts of 1872, Ch. 234, did not violate Article 15 of the Bill of Rights of the Maryland Constitution of 1867 relating to property taxes, because the statute did not impose a property tax but "a tax upon the *franchise* of railroad companies measured by the extent of their business." It also held that a franchise is "a special privilege conferred by the state on certain persons, and which does not belong to them of common right * * *". Later in the opinion the court speaks of "the franchise of a railroad company, namely, its right to maintain and operate its road and to receive fares for freight and passengers".

In *The Cumberland and Pennsylvania Railroad Co. v. State*, 92 Md. 668 (1901), the court held that the gross receipts tax imposed by the Acts of 1890, Ch. 559, and the Acts of 1896, Ch. 120, insofar as they related to gross receipts from operations in interstate commerce apportioned to those received from operations in the State of Maryland, did not violate the Commerce Clause. As to the nature of the gross receipts tax, the court in its opinion (page 677) speaks of such taxes as imposed "*in return* for franchises granted by them to corporations of their creation", and says (page 682) "Since the decision in *State v. P. W. & B. R. R.*, 45 Md., 397, it cannot be questioned that the tax in the present case is a franchise tax, measured in amount by the extent of the business of the corporation * * *", and that the Supreme Court of the United States "must, therefore, if called on to review this decision, assume that this tax is a franchise tax, and upon that assumption, determine its constitutionality".

In *State v. U. S. Fidelity and Guaranty Co.*, 93 Md. 314 (1901), the court speaks of the tax as "imposed on the corporation because of the value of its franchise, as distinguished from its ownership of property".

Again, in *State Tax Commission v. Western Maryland Railway Co.*, 52 A. 2d 615 (1947) the court said:

> "The tax therefore was not a tax upon the property of the corporations affected but was a franchise tax. *Cumberland & P. R. Co. v. State*, 92 Md. 668; *Postal Telegraph-Cable Co. v. Harford Co. Com'rs.*, 131 Md. 96."

Finally, in its opinion in the present case, the Court of Appeals adhered to the above explanation of the nature of the tax (R. 38).

The Court of Appeals in its opinion likewise made it clear that the gross receipts privilege tax is not imposed in return for the franchise to be a corporation or to operate in corporate form. It points out that the "franchise to be a corporation" is separately taxed by a separate statute, Md. Code (1947 Supp.) Art. 81 Sec. 144, and says:

> "The franchise to operate a railroad is of course different from the ordinary privilege conferred by franchise to operate as a corporation" (R. 38-39).

This conclusion would have followed anyway from the fact that the gross receipts franchise tax is imposed upon railroad operating partnerships and individuals as well as upon railroad corporations.

It should also be noted that foreign corporations as well as domestic corporations pay the State a separate annual fee for the privilege of exercising their corporate franchises in the State, imposed by Md. Code (1947 Supp.) Art. 81 Sec. 148. Md. Code (1939 Ed.) Art. 23, Sec. 120(d) requires foreign corporations to register in order to engage in interstate or foreign commerce within the State, but imposes no charge for such registration.

But, as above stated, the privilege to operate a railroad, in the case of Appellant, is a bundle of separable privileges, including (1) a privilege to operate a railroad in intrastate commerce (which is a privilege emanating from the State and which the State can tax); (2) a privilege to operate in interstate commerce, and (3) a privilege to operate in foreign commerce and in the importing and exporting process;—the latter two privileges not granted by the State. And since Appellant engages in all three classes of business, namely, intrastate commerce, interstate commerce and foreign commerce, the question at once arises whether the whole tax imposed by the statute is laid upon, or in return for, the mere intrastate privilege alone, although it is measured by the total gross receipts including those derived from operations in interstate and foreign commerce.

It is submitted that such is not a correct interpretation of the statute. On the contrary, it appears clear that the whole gross receipts tax is a separable one, a distinct portion thereof being laid for the privilege of engaging in intrastate commerce and measured by the separable gross receipts derived from the exercise of that privilege; another distinct portion being laid for the supposed privilege of engaging in interstate commerce, and measured by the separable gross receipts derived from interstate business carried on within the State; and *the third distinct portion being laid in return for the supposed privilege of engaging in foreign commerce and the importing-exporting process, and measured by the separable gross receipts derived therefrom.*

It will be noted from its opinion that the Court of Appeals did not attempt to uphold the tax in question on the ground that it was imposed in return for intrastate or local privileges alone, although measured in amount by the gross receipts from interstate and foreign commerce as well as those from intrastate commerce. On the contrary, the opinion proceeds upon the bold theory that the State may constitutionally tax the privilege of engaging in foreign

commerce and importing-exporting process because it could tax the property of Appellant used in such activity. Furthermore, the Court of Appeals could not, in view of the wording of the statute and of its earlier decisions, have taken the view that the tax was laid upon the intrastate privilege alone.

Section 94½ of Article 81 includes the following:

> "When any public service corporation is engaged in more than one class of business and one or more classes thereof is business not subject to the gross receipts tax or subject thereto at different rates, the operating revenues of the class or classes of business subject to such tax at different rates shall be reported separately and taxed at the rate or rates applicable to such class or classes of business. This section shall not be construed as implying that in the absence of this section, the requirements of Sections 95 to 100, inclusive, could properly be otherwise construed."

It makes no difference whether the Legislature by referring in the above statutory provision to "classes of business" had in mind classes of business such as intrastate commerce, interstate commerce and foreign commerce, or whether it intended some other classification. The important thing is that this statutory provision clearly negatives any idea that the total gross receipts of a public service corporation are to be taken as the measure of the tax, unless they all flow from the exercise of the particular privilege upon which the tax is laid. If such a company derives gross receipts from activities which are not taxed, they are to be excluded from the measure. Thus, the statute makes it plain that only those gross receipts which flow from the exercise of the privilege taxed are to be included in the measure of the tax. Applying that principle to the situation in the case at bar, it is clear that the gross receipts which Appellant earns from its operations in the importing and exporting process are not sought to be included in the

measure of a tax levied solely for the privilege of engaging in intrastate or local operations.

The same conclusion follows from the holding in *State v. Baltimore & Ohio Railroad Co.*, 48 Md. 49 (1878) which is adhered to by the Court of Appeals in the present case. In the *Baltimore & Ohio Railroad Company* case, the court held that only those gross receipts of the railroad were taxable which were derived from those occupations which the company engaged in pursuant to special franchises granted it by the State subsequent to the grant of its original charter. It specifically held (p. 72) that:

> "If the franchises are exempt, it would necessarily follow, that the gross receipts derived from the exercise of its franchises, are also exempt."

The court in that case further specifically held that the gross receipts which the B. & O. Railroad Company obtained from those of its operations which the State had not licensed constituted no part of the measure of the value of the privileges which the State had granted. The receipts from Baltimore & Ohio's warehousing operations (except those incidental to railroad operations) and from its summer hotel business—privileges not granted by the State, were held not to be includible in its taxable gross receipts. It would seem to follow directly from this decision that, if that portion of Appellant's gross receipts which is in issue in the case at bar was derived wholly from a franchise which the State of Maryland did not, and could not, grant, it must, as a matter of statutory construction, be excluded from the calculation of the *quid pro quo* for the intrastate privilege which the State could, and did, confer.

This Court will respect the interpretation which the highest court of Maryland has placed upon the State statute. See *Minnesota v. Probate Court*, 309 U. S. 270, 273 (1940); *Guaranty Trust Co. v. Blodgett*, 287 U. S. 509, 513 (1933); *Southern Gas Corp. v. Alabama*, 301 U. S. 148, 153 (1937). But it is submitted that, if this Court were

free itself to construe the Maryland gross receipts tax statute, it would independently arrive at the interpretation which we have contended for.

This Court has upheld certain State taxes as not repugnant to the Commerce Clause when clearly *levied solely upon the State-conferred intrastate privilege*, although measured to some extent by property, net income or receipts used in or attributable to interstate business. See *International Harvester Co. v. Evatt*, 329 U. S. 416 (1947); *Atlantic Lumber Co. v. Comm'r.*, 298 U. S. 553 (1936); *Matson Navigation Co. v. State Board of Equalization*, 297 U. S. 441 (1936); *American Manufacturing Co. v. St. Louis*, 250 U. S. 459 (1919); *Southern Gas Corp. v. Alabama*, 301 U. S. 148 (1937); *Maine v. Grand Trunk Railroad Co.*, 142 U. S. 217 (1891); *Memphis Gas Co. v. Stone*, 335 U. S. 80 (1948); *Aero Transit Co. v. Comm'rs*, 332 U. S. 495 (1947).

Because that portion of the Maryland gross receipts tax will not bear the interpretation which was placed on the taxes in the cases just cited, they are clearly inapplicable. Even if the Maryland statute in question could be given the same interpretation, the tax measured by the gross receipts from the importing-exporting process would contravene the Import-Export Clause and, even under the Commerce Clause, it should be noted that there are serious limitations upon the permissible extent of the measure of a tax imposed solely upon local privileges. See *Cooney v. Mountain States T. & T. Co.*, 294 U. S. 384 (1935) holding that a State statute may not increase the amount of the tax exacted for the intrastate privilege because of the interstate business done. In that case, Chief Justice Hughes for a unanimous court said (p. 393):

> "Where the tax is exacted from one doing both an interstate and intrastate business, it must appear that it is imposed solely on account of the latter; that the amount exacted is not increased because of the interstate business done; that one engaged exclusively in interstate commerce would not be subject to the tax;

and that the one who is taxed could discontinue the intrastate business without also withdrawing from the interstate business. *Sprout v. South Bend*, 277 U. S. 163, 171; *East Ohio Gas Co. v. Tax Commission*, 283 U. S. 465, 470."

See also *Air-Way Electric Appliance Corp v. Day*, 266 U. S. 71 (1924).

II

The Gross Receipts Which Measured that Separable Portion of the Tax Here Challenged Were Derived by Appellant Solely from Operations in Foreign Commerce and Importing and Exporting Process.

As heretofore stated (p. 15), the Court of Appeals accepted Appellant's contention that the freight which it handled and transported, thereby earning the gross receipts claimed to be exempt, were imports and exports at that time. The Court said (R. 38):

> "The operating revenues claimed by the appellants to be exempt were received for transportation, switching, storage, crane privileges, wharfage and weighing of coal, grain, ores and other miscellaneous commodities *in transit between foreign ports and points within the United States.*"

Indeed, in view of the stipulated facts (R. 23-22-29), there could be no other conclusion. The freight was actually in unbroken transit, in accordance with its original consignments. The freight was then under the domination of the consignors or consignees. The freight was in its unbroken original packages or condition.

The recent decision of this Court in *Hooven & Allison Co. v. Evatt*, 324 U. S. 652 (1945), is direct authority for the proposition that the goods which were shipped from foreign countries to inland destinations in the United States were imports throughout *their entire journey*, and while

they were being handled by Appellant. In that case, a manufacturer in Xenia, Ohio, contracted with foreign shippers for the purchase of hemp and other fibers. Pursuant to these contracts the goods in bales were shipped from places outside the United States, consigned to a broker for the manufacturer at an American port with directions on the bill of lading "Notify the Hooven & Allison Co.", the manufacturer. Title to the goods passed to the manufacturer at the American port, and the manufacturer then gave instructions to the broker for the reshipment of the goods from the port to Xenia, Ohio. It was held, in an opinion by Chief Justice Stone, that the manufacturer, since it was "the inducing and efficient cause of bringing the merchandise into this country, which is importation", was the importer, and that the goods continued to enjoy the status of imports until they arrived at Xenia, Ohio, and even after that time while they were stored in their unbroken original packages at the manufacturer's warehouse in Xenia, Ohio, awaiting their use in manufacturing operations. It followed that so long as these goods remained imports they were exempt from an *ad valorem* property tax of the State of Ohio by reason of the Import-Export Clause of the Constitution. It is abundantly clear from this case that all of the carriers, both land and water, which participated in the over-all transit of these goods from foreign countries to Xenia, Ohio, were engaged in the importing process.

This Court has also clearly announced the rule as to when goods intended for export to a foreign country actually take on the status of exports. In *Coe v. Errol*, 116 U. S. 517, 526 (1886), this Court said:

> "In regard to imports from foreign countries, it was settled in the case of *Brown v. Maryland*, 12 Wheat. 419, that the State cannot impose any tax or duty on such goods so long as they remain the property of the importer, and continue in the original form or packages in which they were imported * * *.

> "But no definite rule has been adopted with regard to the point of time at which the taxing power of the State ceases as to *goods exported to a foreign country* or to another State. What we have already said, however, in relation to the products of a State intended for exportation to another State will indicate the view which seems to us the sound one on that subject, namely, that such goods do not cease to be part of the general mass of property in the State, subject, as such, to its jurisdiction, and to taxation in the usual way, until they have been shipped, or entered with a common carrier for transportation to another State, or *have started upon such transportation in a continuous route or journey.* We think this must be the true rule on the subject." (Italics supplied.)

Of the above quotation, from *Coe v. Errol* this Court said in *Empresa Siderurgica v. Merced Co.*, 337 U. S. 154, 156 (1949):

> "That test was fashioned to determine the validity under the Commerce Clause of a non-discriminatory State tax. But as we noted in *Richfield Oil Corp. v. State Board*, 329 U. S. 69, 79, it is equally applicable to cases arising * * * under Art. 1, Sec. 10, Cl. 2 (the Import-Export Clause)."

Unquestionably, if the gasoline held taxable in *Joy Oil Co. v. State Tax Commission*, 337 U. S. 286 (1949) had not been stored at Dearborn, Michigan, for fifteen months but only for a reasonable time awaiting transshipment to Canada, this Court would have held that the rail transportation of the gasoline to Dearborn, solely within the confines of Michigan, *and the storage at Dearborn* were part of foreign commerce and the exporting process. The Court held that by the initial land carriage "one step in the process of exportation had been taken", but that the status of the goods changed by reason of *the long storage period* at Dearborn.

In the *Empresa Siderurgica* case, supra, those portions of a cement plant located in California sold to a foreign purchaser for export which had not been actually delivered to the initial rail carrier for shipment to the California port, were held subject to a California property tax, but there was not even an attempt in that case to lay the state tax on that portion of the plant which had been delivered to the rail carrier, and had thereby entered the export process, and it is implicit in the decision that such a tax, if laid, would have constituted a tax on an export contrary to Article 1, Section 10, Clause 2 of the Constitution.

It follows, moreover, that Appellant's services in handling and forwarding these imports and exports were part and parcel of importing and exporting process; and nothing in the opinion of the Court of Appeals runs counter to that contention. The services were performed without delay. They were performed at the request of the original consignors or consignees. They were all necessary to the continued and originally intended transportation of the goods.

There can be no question but that these activities of Appellant constituted foreign commerce. Transportation is "commerce itself". *Fargo v. Michigan*, 121 U. S. 230 (1887); *Gibbons v. Ogden*, 9 Wheat. (U. S.) 1 (1824). This is true, although Appellant's services were all performed within a single state. *The Daniel Ball*, 10 Wall. (U. S.) 557 (1870); *Foster v. Davenport*, 22 How. (U. S.) 244, 246 (1859); *Texas & New Orleans Railroad Co. v. Sabine Tram Co.*, 227 U. S. 111 (1913); *R. R. Commission v. Texas & Pacific Ry. Co.*, 229 U. S. 336 (1913); *Carson Petroleum Co. v. Vial*, 279 U. S. 95 (1929); *Brown v. Maryland*, 12 Wheat. (U. S.) 419 (1827); *Puget Sound Stevedoring Co. v. Tax Commission*, 302 U. S. 90 (1937); *Joseph v. Carter & Weekes Stevedoring Co.*, 330 U. S. 422 (1947). This is true, although the freight was moving by so-called "split" means of transportation, i. e. by vessels and then by trucks or railroad cars and vice versa. *U. S. v. Capitol Transit Co.*, 325 U. S. 357 (1945); *U. S. v. Yellow Cab Co.*, 332 U. S. 218,

228 (1947. This is true, notwithstanding re-shipments at Appellant's piers, the power of the owner of the freight to divert it, and the incidental delays which were occasioned solely by the rendition of Appellant's necessary services to the freight. "Temporary interruptions due to the necessities of the journey or for the purpose of safety and convenience in the course of the movement" do not change the character of the commerce. *Minnesota v. Blasius*, 290 U. S. 1, 9-10 (1933); *Kelley v. Rhoads*, 188 U. S. 1 (1903); *Champlain Co. v. Brattleboro*, 260 U. S. 366 (1922); *Hughes Bros. Co. v. Minnesota*, 272 U. S. 469, 476 (1926); *United States v. Erie R. R. Co.*, 280 U. S. 98 (1929).

Similarly, there can be no question but that, under the authorities, these activities of Appellant constituted a part of the importing and exporting process. Selling imports has not been held to be a part of the importing process. *Brown v. Maryland*, 12 Wheat. (U. S.) 419 (1827). Selling exports has been held to be part of the exporting process. *Richfield Oil Corp. v. State Board of Equalization*, 329 U. S. 69 (1946); *Crew-Levick Co. v. Pennsylvania*, 245 U. S. 292 (1917). The activities of an auctioneer in selling imports has been held to be part of the importing process. *Cook v. Pennsylvania*, 97 U. S. 566 (1878). Stevedoring imports and exports has been held to be part of the importing and exporting process. *Joseph v. Carter & Weekes Stevedoring Co.*, 330 U. S. 432 (1947); *Puget Sound Stevedoring Co. v. Tax Commission*, 302 U. S. 90 (1937). (See explanation of the *Puget Sound Stevedoring Co.* case in *Freeman v. Hewit*, 329 U. S. 249, 267 Footnote (1946)). Issuing a railroad bill of lading for goods to be exported has been held to be part of the exporting process. *Fairbank v. United States*, 181 U. S. 283 (1901). Issuing a water bill of lading for freight then regarded as exports has been held to be part of the exporting process. *Almy v. California*, 24 How. (U. S.) 169 (1860). Entering into a charter party for the carriage of exports has been held to be a part of the export-

ing process, *United States v. Hvoslef*, 237 U. S. 1 (1915). Issuing a policy of marine insurance covering exports has been held to be a part of the exporting process, *Thames & Mersey Marine Insurance Co. v. United States*, 237 U. S. 19 (1915).

In view of the above authorities, it would be odd indeed to find that railroad transportation of imports and exports is not part of the importing and exporting process, and indeed such transportation has been held to be such in *Joy Oil Co. v. State Tax Commission*, 337 U. S. 286 (1949) in which this Court stated that by the initial land carriage "one step in the *process of exportation* had been taken". And the Attorney General of the United States, in a considered opinion, has arrived at the same conclusion. See 31 Op. Atty. Gen. (U. S.) 329 which is quoted in full in the Record (R. 32-35).

In the Court of Appeals, Appellees argued that the terms "exporting process" and "importing process", as used by this Court in condemning State taxes upon such processes, are "words of art" with special meaning. They argued that "the term 'process' is used as a word of art to mean those transactions, in the case of exports, which begin at dock side". They also implied that "importing process" means only those activities in relation to imports which take place before the goods arrive from abroad at the dock in this country. This very argument was expressly rejected by Chief Justice Marshall in *Brown v. Maryland*, 12 Wheat. (U. S.) 419 (1827). It is also refuted by the holdings in *Cook v. Pennsylvania*, 97 U. S. 566; *Fairbank v. United States*, 181 U. S. 283, and *Crew-Levick Co. v. Pennsylvania*, 245 U. S. 292. In the *Cook* case, the auctioneers' services in selling, within the State of Pennsylvania, imports still in their original packages were performed after the goods had left the dock side, but they were nevertheless held to be part of the importing process and immune from a State franchise or license tax upon the privilege of performing those services.

In the *Fairbank* case, the activities of the initial railroad carrier performed in Minnesota, i. e., entering into a contract of affreightment there by issuing a bill of lading, were held to be part of the exporting process.

In the *Crew-Levick Co.* case, the exporters activities were performed within the City of Philadelphia and not at or beyond the dock side, but they were nevertheless held immune from a State franchise or license tax sought to be imposed upon the privilege of engaging in such activities.

Appellees also stressed below that Appellant was "engaged solely in affording transportation and related services under instructions from others" and argued from this fact that Appellant's activities were not in the importing and exporting process. But, here again, this argument is refuted by *Cook v. Pennsylvania*, 97 U. S. 566, in which the auctioneer did not own the imports but performed his services solely "under instructions from others". It is refuted by *Fairbank v. United States*, 181 U. S. 283, and by *Almy v. California*, 24 How. (U. S.) 169, in which the carriers who issued the bills of lading acted not as owners of the freight, but "under instructions from others". And it is refuted by *United States v. Hvoslef*, 237 U. S. 1 (1915) and *Thames & Mersey Marine Insurance Co. v. U. S.*, 237 U. S. 19 (1915), in which the shipbrokers and the marine insurance company were not owners of the goods but performed their respective services "under instructions from others".

III.

That Separable Portion of the Gross Receipts Tax Here Challenged Contravenes the Import-Export Clause.

As an original proposition, it was long ago argued that the phrase "any Imposts or Duties on Imports or Exports" in the Import-Export Clause was intended to mean no more than property taxes on goods while they constitute imports or exports or, at the most, taxes in the nature of a tariff. The construction which Chief Justice Marshall in

Brown v. Maryland 12 Wheat. (U.S.) 419 (1827) put upon the provision was to the contrary, and this construction has been followed by this Court ever since. The phrase, of course, includes such property taxes and tariffs, but it has also a much broader meaning. The authorities to be discussed in this section of the brief conclusively show, we submit, that the prohibition extends to and covers State franchise and occupation taxes such as the portion of the Maryland Gross Receipts Tax under consideration. The clause gives "immunity to the process of exportation and to the transactions and documents embraced in that process". See *Willcuts v. Bunn*, 282 U. S. 216, 228 (1931).

Probably the fullest elucidation of the meaning of the Import-Export Clause and its applicability is provided by the opinion of this Court in *Richfield Oil Corp. v. State Board*, 329 U. S. 69 (1946). This opinion had the concurrence of seven justices of this Court and occasioned only one dissent.

In the *Richfield case*, a California statute levied a franchise or occupation tax on retailers, measured by gross receipts, "for the privilege of selling tangible personal property at retail". The California Supreme Court held that the tax was "an excise tax for the privilege of conducting a retail business measured by the gross receipts from sales" and that the "taxable incident" was the passage of title to the goods. The taxing authorities of California, their action being approved and affirmed by the California Supreme Court, included the gross receipts from the following transaction in the measure of the occupation tax laid upon the Richfield Oil Corp.

Richfield Oil Corp. entered into a contract with the New Zealand government for the sale of oil, f. o. b. Los Angeles, delivery to be made into the vessel owned by the New Zealand government in the harbor of Los Angeles, the oil when so delivered to be consigned to the Naval Officer-in-Charge at Auckland, New Zealand. The Richfield Company carried the oil by its own pipe lines from its refinery in California

to storage tanks at the Los Angeles harbor and pumped it from the storage tanks into the vessel of the purchaser. Thus, no land or water common carrier was employed for any part of the transportation.

This Court held that the inclusion of the gross receipts from this sale in the measure of the franchise tax assessed against the Richfield Oil Corp. was unconstitutional, in violation of the Import-Export Clause. It held that the California Supreme Court had erred in holding: (1) that the incident which gave rise to the accrual of the tax, namely, the passage of title, occurred prior to the commencement of the exportation, and (2) that, assuming the tax to be valid under the Commerce Clause of the Constitution, it must be valid under the Import-Export Clause.

This Court, after noting the *concessum* of the State that the oil would have become an export when shipped from the refinery, if it had been there delivered to an inland carrier for export, and earlier decisions which established that proposition, decided that the oil became an export, and that the process of exportation began, no later than the time the oil was delivered into the purchaser's vessel.

This part of the *Richfield* decision is therefore direct authority that the bundles of sheet steel in the case at bar, as soon as they were delivered to the inland carrier for export to South Africa, became exports in the process of exportation, and were in that status while they were being handled and forwarded by Appellant. See also *Spaulding & Bros. v. Edwards*, 262 U. S. 66 (1923).

This Court in the *Richfield case* then held that when the "taxable incident" i. e. the passage of title by delivery of the oil into the vessel, occurred, the oil had become an export in the process of exportation. So in the case at bar the "taxable incident" was the rendition by Appellant of its forwarding services. When that occurred the bundles of sheet steel shipped from points in Pennsylvania to South Africa had become exports and were in the process of exportation.

In the *Richfield case* the argument was refuted that implied exceptions might be read into the prohibition of the Import-Export Clause, and that the immunity from state taxation which it conferred was no broader than that accorded to interstate and foreign commerce under the Commerce Clause. On this point this Court said (pp. 75, 76, 78):

> "The two constitutional provisions, while related, are not co-terminous. To be sure, a state tax has at times been held unconstiutional both under the Import-Export Clause and under the Commerce Clause. *Brown v. Maryland*, 12 Wheat. 49; *Crew-Levick Co. v. Pennsylvania*, 245 U. S. 292. But there are important differences between the two. The invalidity of one derives from the prohibition of taxation on the import or export; the validity of the other turns nowise on whether the article was, or had ever been, an import or export. * * * Moreover the Commerce Clause is cast, not in terms of a prohibition against taxes, but in terms of a power on the part of Congress to regulate commerce. * * *
>
> "It seems clear that we can not write any such qualifications (those under the Commerce Clause) into the Import-Export Clause. It prohibits every State from laying 'any' tax on imports or exports without the consent of Congress. Only one exception is created—'except what may be absolutely necessary for executing it's inspection Laws'. The fact of a single exception suggests that no other qualification of the absolute prohibition was intended. It would entail a substantial revision of the Import-Export Clause to substitute for the prohibition against 'any' tax a prohibition against 'any discriminatory' tax. * * * the limitations of one cannot be read into the other. * * *
>
> "We cannot, therefore, read the prohibition against 'any' tax on exports as containing an implied qualification.

It is submitted that this part of the decision in the

Richfield case, constitutes a complete answer to the holding of the Court of Appeals in the case at bar that the franchise or priviledge tax in question may be upheld as an "in lieu tax". *This Court flatly rejected the Commerce Clause technique in dealing with the more stringent prohibition of the Import-Export Clause.* Since, unlike the Commerce Clause, this constitutional provision prohibits "any" tax, it prohibits all taxes, in lieu or otherwise. The "in lieu" property tax cases under the Commerce Clause are inapplicable on this ground alone.

When the prohibition against taxing a certain object or transaction is a flat and unqualified one, the object or transaction may not be subjected to taxation indirectly, or in another guise. See *Frick v. Pennsylvania*, 268 U. S. 473, 494 (1925); *N. J. Realty Title Co. v. Div. of Tax Appeals*, 338 U. S. 665 (1950).

In the Richfield case, this Court then turned to the question of whether the particular California franchise or occupation tax, to the extent that it was measured by the gross receipts from this export sale, constituted an impost or duty within the meaning of the Import-Export Clause. It held that it did, saying (pp. 83, 84, 85):

> "It is argued, however, that the present tax is not an impost within the meaning of the Import-Export Clause. * * *
>
> "Appellee concedes that the prohibition of the Import-Export Clause would be violated if the goods were taxed as exports or because of their exportation, or if the process of exportation were itself taxed. We perceive, however, *no difference in substance between any tax so labeled ant the present tax.* * * * The incident which gave rise to the accrual of the tax was a step in the export process.
>
> "Moreover, *Brown v. Maryland, supra*, rejected an argument that while a state could not tax imports, it could tax the privilege of selling imports. * * *
>
> "The prohibition contained in the Import-Export Clause against taxation on exports clearly involves

more than a mere exemption from taxes laid specifically on the exported goods themselves." (Italics supplied.)

It will be noted that it could not be successfully argued in the *Richfield* case that the whole tax was really laid on Richfield's state licensed intra-state selling activities and that it was permissible to measure the value of that state-granted privilege by the proceeds of a transaction which the state could not license. No more can such an argument prevail in the case at bar.

The holding in the *Richfield* case followed naturally from the decision in *Crew-Levick Co. v. Pennsylvania*, 245 U. S. 292 (1917). There, a state statute impose an annual mercantile license tax equal to a percentage of gross receipts from the business. The taxpayer sold $47,000 worth of merchandise to purchasers within the state and $430,000 worth to purchasers in foreign countries. This Court held violative of the Import-Export Clause and the Commerce Clause that portion of the tax measured by the gross receipts from the exportation.

We have already demonstrated *supra*, that Appellant's activities in question were part and parcel of the import-export process and we have cited the case of *Puget Sound Stevedoring Co. v. Commission*, 302 U. S. 90 (1937) which held that a State occupation tax upon stevedoring could not be measured by the gross receipts derived from stevedoring activities which were in foreign commerce. That decision rested upon the Commerce Clause, the Import-Export Clause apparently not having been invoked. But it would seem to follow, from the explanation of the two clauses in *Richfield Oil Corp. v. State Board*, *supra*, that an attempt to measure the State tax upon the stevedoring occupation by gross receipts from stevedoring imports and exports would *a fortiori* offend the stricter and unqualified provision of the Constitution, the Import-Export Clause.

And the decision in the *Puget Sound Stevedoring Co.*

case has been explained and approved on that ground. See Rutledge, J., concurring in *Freeman v. Hewit*, 329 U. S. 249, 266 (1946).

Joseph v. Carter and Weekes Stevedoring Co., 330 U. S. 422 (1947), a case almost identical on its facts with *Puget Sound Stevedoring Co. v. State Board, supra*, was decided on the authority of that case. A New York occupation tax upon stevedoring measured by gross receipts from servicing ships wholly within the port of New York, which, however, moved in interstate and foreign commerce, was held invalid under the Commerce Clause. Here again, since the whole tax as measured by gross receipts from both interstate and foreign commerce was under attack and since five of the justices were willing to condemn the exaction under the Commerce Clause, there was no occasion for them to articulate a condemnation under the Import-Export Clause of only a smaller portion of the tax. The majority opinion was delivered by Mr. Justice Reed, with whom concurred the Chief Justice and Frankfurter, Jackson and Burton, J. J. In a separate opinion, two justices, Douglas and Rutledge, J. J., dissented from the condemnation of the tax under the Commerce Clause but, invoking the Import-Export Clause, concurred in the result in so far as it struck down that part of the tax measured by the gross receipts from stevedoring imports and exports.

When it is remembered that the attack on the tax was made on its constitutionality under the Commerce Clause, it is obvious that there is no significance in the failure of any of the majority expressly to join in this view. They had already held the tax bad as to interstate as well as foreign commerce. Every one of them was in the majority in the *Richfield Oil Co. case*. There is no such thing as import or export business which is not foreign commerce and while a State tax on the processes of importation and exportation may "survive the tests of validity under the Commerce Clause and fail to survive the Import-Export Clause", the reverse is not true. If such a tax is invalid

under the Commerce Clause, it is necessarily also invalid under the Import-Export Clause. Accordingly, if the case had come up soley under the Import-Export Clause, one would have expected the five justices who joined in the majority opinion to have joined with Mr. Justice Douglas and Mr. Justice Rutledge in condemning the tax as applied to foreign commerce under that clause. That would mean a seven to two decision. See Professor Powell's interpretation of the decision in "More Ado About Gross Receipts Taxes", 60 Harv. L. Rev. 744.

In *Cook v. Pennsylvania*, 97 U. S. 566 (1878), a Pennsylvania statute required auctioneers in Philadelphia to be licensed and imposed a duty to be paid by such auctioneers equal to a percentage of their gross receipts from auction sales of goods of foreign growth or manufacture. The State contended that "being a tax on him for the right and privilege to sell at auction, it is not a tax on the article sold but the amount of the sales made by him is made a measure of that privilege." This Court held, "It was, then, a tax on the privilege of selling foreign goods at auction", and that it was invalid under the Import-Export Clause and the Commerce Clause in so far as it was measured by gross receipts from auction sales of imported goods still in their original packages.

It will be noted that, for its decision in the *Richfield Oil Company* case, this Court cited and relied heavily upon *Fairbank v. U. S.*, 181 U. S. 283 (1901); *U. S. v. Hvoslef*, 237 U. S. 1 (1915), and *Thames & Mersey Insurance Co. v. U. S.*, 237 U. S. 19 (1915). These three cases are all decisions striking down federal taxes because violative of the Export Clause of the Constitution of the United States (Art. I, Sec. 9, Clause 5), which is a limitation upon the Federal Government and which provides:

> "No Tax or Duty shall be laid on Articles exported from any State."

These cases are, however, directly in point here, because

the meanings of the Export Clause and the Import-Export Clause "as to the act which is prohibited" are the same. See *Brown v. Maryland*, 12 Wheat. 419, 445.

A stamp tax on a bill of lading is an excise for the privilege of entering into a contract of affreightment with a common carrier. The same is true of a stamp tax upon a charter party, since a charter party (other than a lease of the vessel) is a contract of affreightment for the whole cargo. A stamp tax upon a marine insurance policy insuring a cargo is an excise for the privilege of entering into the contract of insurance. In *Thomas v. U. S.*, 192 U. S. 363, 370 (1904), the words duties, imports and excises as used in the Constitution are defined "to cover customs and excise duties imposed on importation, consumption, privileges, particular business transactions, vocations, occupations and the like". One would suppose that, if excises such as these are imposts or duties upon imports or exports, when the goods carried or insured, as the case may be, are imports or exports, then *a fortiori* a privilege tax (as in the case at bar) upon the privilege of engaging in the occupation of carrying and handling imports and exports is an impost or duty upon the imports or exports. Appellant's gross receipts in question here are the proceeds of its contracts of affreightment for imports and exports. A tax on the privilege of carrying goods is certainly as direct a burden upon the goods themselves as is the tax upon a privilege to enter into a contract to do so (i.e., a bill of lading or charter party), and is even more direct a burden upon the goods than is a tax upon the privilege of insuring the goods in transit.

Yet a stamp tax upon a foreign bill of lading, upon a charter party and upon a contract of marine insurance, where the goods carried were exports, have been held to be taxes or duties upon the "Articles exported". See *Fairbank v. U. S.*, 181 U. S. 283 (1901); *U. S. v. Hvoslef*, 237 U. S. 1 (1915), and *Thames & Mersey Insurance Co. v. U. S.*, 237 U. S. 19 (1915).

On the authority of these cases, Attorney General Gregory in a formal opinion dated March 12, 1918, 31 Op. Atty. Gen. 29, ruled that a federal tax upon freight (i.e., the compensation for railroad carriage) where the articles are in the course of exportation would violate the Export Clause of the Constitution. For the convenience of the court, this opinion of Attorney General Gregory is set forth in full in the Record (R. 32 35).

In *Fairbank v. U. S.*, 181 U. S. 283 (1901), goods were shipped from Minnesota to Liverpool, England. The agent of the initial railroad carrier in Minnesota was convicted for failing to affix to the export bill of lading issued by him an internal revenue stamp as required by the War Revenue Act of 1898. The tax was laid upon the railroad company. The Supreme Court reversed the conviction, holding that this tax upon the railroad's contract of carriage was violative of the Export Clause.

In so holding the Court did not identify the bill of lading with the goods themselves (as goods in transit are now for some commercial purposes identified with an order bill of lading). The statute applied to straight bills of lading and therefore the decision cannot be explained upon that ground. The Court (p. 293) said:

> "If all exports must be free from national tax or duty, such freedom requires, not simply an omission of the tax on the articles exported, but also a freedom from any tax which directly burdens the exportation; and, as we have shown, a stamp tax on a bill of lading, which evidences the export is just as clearly a burden on the exportation as a direct tax on the article mentioned in the bill of lading as the subject of the export."

In *U. S. v. Hvoslef*, 237 U. S. 1 (1915), a firm of ship brokers having paid, in obedience to the War Revenue Act of 1898, stamp taxes on charter parties, entered into exclusively for the carriage of cargoes from ports in the United States to foreign ports, instituted an action for a re-

fund of tax. The Supreme Court affirmed the judgment for the taxpayers and held that such a charter party was "a mere contract of affreightment". After approving the decision in the Fairbank case, the Supreme Court said, "in legal principle, there can be no distinction which can condemn the tax in the one case and save it in the other". It added that "a tax on these charter parties was in substance a tax on the exportation; and a tax on the exportation is tax on the exports".

In *Thames & Mersey Insurance Company v. U. S.*, 237 U. S. 19 (1915), the Appellant was engaged in the business of underwriting policies of marine insurance, and it brought an action to recover the amounts paid by it as stamp taxes on policies which it had issued insuring certain exports against marine risks. The taxes were imposed upon the insurance company under the War Revenue Act of 1898. The Court held that these taxes could not constitutionally be imposed in view of the Export Clause. The Court posed the question "Is the tax upon such policies so directly and closely related to the 'process of exporting' that the tax is in substance a tax upon the exportation and hence within the Constitutional prohibition?" Answering this question in the affirmative, the Court said (pp. 26, 27):

> "It cannot be doubted that insurance during the voyage is by virtue of the demands of commerce an integral part of the exportation; the business of the world is conducted upon this basis. * * * proper insurance during the voyage is one of the necessities of exportation. The rise in rates for insurance as immediately affects exporting *as an increase in freight rates*, and the taxation of policies insuring cargoes during their transit to foreign ports is as much a burden on exporting as if it were laid on the charter parties, the bills of lading, or the goods themselves." (Italics supplied.)

See also:

Almy v. California, 24 How. (U. S.) 169 (1860), a de-

cision announced by Chief Justice Taney that a state tax upon a bill of lading issued for articles which were at that time regarded as exports would be violative of the Import-Export Clause.

New York and Cuba Mail S. S. Co. v. U. S., 125 Fed. 320 (1903), holding that a federal stamp tax on manifests for clearance of the cargo of any ship for a foreign port violates the Export Clause. This decision was reversed on other grounds, 200 U. S. 488, but the holding of the lower court that the tax was unconstitutional was expressly approved in *U. S. v. Hvoslef, supra.*

See also:

Willcuts v. Bunn, 282 U. S. 216, 228 (1931).

In the court below, the State Tax Commission relied upon *Inter-Island Steam Navigation Co. v. Hawaii*, 96 F. 2d 412 (1938, C.C.A. 9th), affirmed 305 U. S. 306. But the case is readily distinguishable. There, under a statute of the Territory of Hawaii, a public utilities commission was empowered to investigate public utilities of the territory and each public utility subject to investigation was required to pay the commission an annual "fee which shall be equal to 1/20th of 1% of the gross income" of the utility "for the payment of all salaries, wages and expenses" incurred by the commission in making the investigations. The Inter-Island Company resisted the exaction in so far as it applied to that part of its gross receipts from transporting goods in interstate commerce. It is by no means clear that the Company was engaged in handling and transporting imports and exports. The Court held that the fee did not contravene the Import-Export Clause. It will be seen at once, however, that this fee falls directly within the one exception contained in the Import-Export Clause, namely, "except what may be absolutely necessary for executing its inspection Laws". Furthermore, since the fees were no more than sufficient to cover the expenses of the inspection, there was no "net Produce" to be turned over to "the Treasury of the United States".

In *New York v. Roberts*, 171 U. S. 658 (1898), the tax upheld was a franchise tax "upon the franchise of doing business *as a corporation*", the measure or basis of the tax being the amount of capital stock employed in the state. The company did a local intrastate business there as well as engaged in interstate and foreign commerce, but part of its capital stock in the state was invested in imports. The tax was construed to be a tax levied, not upon the privilege of importing and exporting or upon the doing of that business, but *solely upon the privilege to engage in local activities*. Furthermore, the tax was measured by the company's entire property in the state and not by gross receipts derived by selling imports and exports. See the explanation of the *Roberts* case in *Anglo-Chilean Corp. v. Alabama*, 288 U. S. 218, 227-8 (1933). In the latter case, a state tax, construed to be laid upon the actual doing of an importing business was held invalid under the Import-Export Clause and also under the Commerce Clause.

Cases sustaining ad valorem property taxes upon physical property used in the importing business are also beside the point. The same may be said of cases like *New York ex rel Burke, Ltd. v. Wells*, 208 U. S. 14 (1908), upholding a state property tax upon the proceeds of imports sold, which proceeds the importer had not remitted at once to the exporter but had mingled with his other working capital—an illustration of a broken original package.

Likewise, cases like *Peck & Co. v. Lowe*, 247 U. S. 165 (1918), and *National Paper & Type Co. v. Bowers*, 266 U. S. 373 (1924), are beside the point. They upheld income taxes *upon net income* derived from gross income, which in turn had been derived in part from the sale of imports and exports, for the obvious reason that the thing taxed "is as far removed from exportation as are articles intended for export before exportation begins".

IV.

That Separable Portion of the Gross Receipts Tax Here Challenged Contravenes the Commerce Clause.

For reasons of policy, Appellant in this case has not assailed the statute, in so far as it imposes a tax upon its privilege of operating a railroad in interstate commerce and measures that tax by its interstate gross receipts.

It does, however, have the Commerce Clause as the second string to its bow in its attack upon that portion of the tax which it does challenge.

It will be remembered that *Brown v. Maryland*, 12 Wheat. (U. S.) 419 (1927); *Crew-Levick Co. v. Pennsylvania*, 245 U. S. 292 (1917) and *Joseph v. Carter & Weekes Stevedoring Co.*, 330 U. S. 422 (1947) are authorities for the proposition that a tax such as the one in question here is bad under the Commerce Clause as well as under the Import-Export Clause. See also *Anglo-Chilean Corp. v. Alabama*, 288 U. S. 218 (1933).

If we have clearly interpreted the Maryland Statute, as a matter of State law, to levy a separable tax for the privilege of engaging in foreign commerce, then it follows that the tax conflicts with the Commerce Clause, unless a whole line of decisions of this Court is now to be overruled. As recently as 1944 this Court said in *Spector Motor Service v. McLaughlin*, 323 U. S. 101, 103:

> "If Connecticut in fact sought to tax the right to engage in interstate commerce, a long course of constitutional history and 'an unbroken line of decisions' would indeed be brought into question."

A partial list of the cases that flatly hold that a privilege tax may not be exacted in return for such a privilege are:

Joseph v. Carter & Weekes Stevedoring Co., 330 U. S. 422 (1947); *Puget Sound Stevedoring Co. v. Commission*, 302 U. S. 90 (1937); *Gwin, White & Prince, Inc. v. Henne-*

ford, 305 U. S. 434 (1938); *Fisher's Blend Station v. Commission*, 297 U. S. 650 (1936); *Cooney v. Mountain States T. & T. Co.*, 294 U. S. 384 (1935); *Strout v. South Bend*, 277 U. S. 163 (1928); *Helsen & Randolph v. Kentucky*, 279 U. S. 245 (1929); *Lelong v. Mobile*, 127 U. S. 640 (1888); *Ozark Pipe Line v. Monier*, 266 U. S. 555 (1925); *Alpha Portland Cement Co. v. Massachusetts*, 268 U. S. 203 (1925).

See also *Freeman v. Hewit*, 329 U. S. 249 (1946).

Indeed, we might offer as our brief on this point the opinion of Mr. Justice Reed, which had the concurrence of the Chief Justices Mr. Justice Frankfurter and Mr. Justice Jackson, in *Interstate Oil Pipe Line v. Stone*, 337 U. S. 662 (1949). The decision in that case could not be cited against us because the tax was upheld only because Mr. Justice Burton took the view that the privilege there taxed was to engage in intrastate commerce.

Central Greyhound Lines v. Mealey, 334 U. S. 655 (1948) could not be cited against us, because clearly the tax there sustained was a property tax upon the apportioned gross receipts themselves and not a tax upon the privilege of engaging in interstate commerce. See 334 U. S. at pp. 654, 662-663, and in the dissenting opinion, pp. 664, 669 and the explanation which was made of the nature of the tax in the *Central Greyhound Lines* case, in *Memphis Gas Co. v. Stone*, 335 U. S. 80 at page 97 and in *Interstate Oil Pipe Line v. Stone*, 337 U. S. 662 at pp. 666, 667, 679-680-681.

Memphis Gas Co. v. Stone could not be cited against us, because the tax there sustained was not levied upon the privilege of engaging in interstate commerce, but for the protection of "local activities in maintenance, keeping in repair, and otherwise in manning" the pipe line within Mississippi. *Maine v. Grand Trunk Railway*, 142 U. S. 217 (1891) could not be cited against us, because the tax there upheld was levied solely upon the intrastate privilege. The tax in the *Maine* case has been explained to be such in *Central Greyhound Lines v. Mealey*, 653, 658-9 (1948); *Interstate Oil Pipe Line v. Stone*, 337 U. S. 662, 680-1 (1949)

and *Joseph v. Carter & Weekes Stevedoring Co.*, 330 U. S. 422, 435 (1947).

The principal reasons advanced for regarding the Commerce Clause as a prohibition against a tax laid on the privilege in engaging in interstate and foreign commerce are, (1) such a tax is a direct burden on such commerce, and (2) the tax is exacted for a privilege or right which the State cannot grant or withhold.

The second reason for the rule is strikingly applicable to this case. Appellant enjoys protection of its property, and it pays heavy local taxes for that protection. It enjoys from the State a franchise to be a corporation, and it pays the State an annual tax for that privilege under the provisions of Md. Code (1947 Supp.), Art. 81, Sec. 144. It enjoys a franchise from the State to operate its railroad in *intrastate commerce*, and it does not resist that separable portion of the Gross Receipts Tax statute which taxes that local privilege and measures the tax by the gross receipts from the exercise of that local privilege. It receives nothing else from the State for which the State can ask additional return. It does not even use the highways of the State, or any other State property, and so could not be assessed a tax for that privilege, such as was involved in *Aero Transit Co. v. Comm'rs.*, 332 U. S. 495 (1947).

"To carry on interstate commerce is not a franchise or a privilege granted by the State; it is a right which every citizen of the United States is entitled to exercise under the Constitution and laws of the United States * * *." *Crutcher v. Kentucky*, 141 U. S. 47, 57 (1891).

In *West v. Kansas Natural Gas Co.*, 221 U. S. 229, 260 (1911) it was said, "At this late day it is not necessary to cite cases to show that the right to engage in interstate commerce is not the gift of a state * * *." And see, *Adams Express Co. v. New York*, 232 U. S. 14 (1914); *Sault Ste. Marie v. International Transfer Co.*, 234 U. S. 333 (1914); *Buck v. Kuykendall*, 267 U. S. 307 (1925); *Bush*

& Sons Co., v. Maloy, 267 U. S. 317 (1925); *Mayor of Vidalia v. McNeely*, 274 U. S. 676 (1927).

The tax here assailed bears no "fiscal relation to protection, opportunities and benefits given by the state." It fails to meet the requirement that "the state has given anything for which it can ask return." Compare *Wisconsin v. J. C. Penney Co.*, 311 U. S. 435, 444 (1940).

Furthermore, a franchise tax upon the privilege of operating in foreign commerce cannot be upheld, even though, as here, it is imposed in the place and stead of relatively small ad valorem property taxes *for state purposes. United States Express Co. v. Minnesota*, 223 U. S. 335 (1912); *Cudahy Packing Co. v. Minnesota*, 246 U. S. 450 (1918); *Great Northern Railway Co. v. Minnesota*, 278 U. S. 503 (1929); and *Illinois Central Railway Co. v. Minnesota*, 309 U. S. 157 (1940) have no application, because those "in lieu" taxes were property taxes upon the gross receipts themselves. As before stated, *Maine v. Grand Trunk Railway Co.*, 142 U. S. 217 (1891) has no application, even if regarded as a "in lieu" tax case, because the tax there was a franchise tax imposed solely upon the privilege of engaging in intrastate commerce.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Court of Appeals of Maryland should be reversed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 96

CANTON RAILROAD COMPANY,
Appellant,

vs.

JOSEPH H. A. ROGAN, OWEN E. HITCHENS AND WILLIAM W. TRAVERS, CONSTITUTING THE STATE TAX COMMISSION OF MARYLAND,
Appellees.

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Appellees.

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APPELLEES' BRIEF

OPINION BELOW

The Opinion of the Court of Appeals has not been officially reported. It may be found, however, in 73 A. (2d) 12.

JURISDICTIONAL STATEMENT

These are two appeals from a decree of the Court of Appeals of Maryland, in a consolidated case, affirming decrees of the Circuit Court No. 2 of Baltimore City, which sustained final assessments made against both Appellants by the Maryland State Tax Commission for gross receipts taxes imposed by Section 95 of Article 81 of the Annotated Code of Maryland (1943 Supplement). In the case of the Appellant Canton Railroad Company (hereinafter called "Appellant Canton"), the assessment was made on gross receipts earned in the calendar year 1946. In the case of the Appellant Western Maryland Railroad (hereinafter called Appellant "Western Maryland"), the assessment was made on gross receipts earned in the calendar years 1945 and 1946.

Section 95 of Article 81, *supra*, quoted at length in both of the Appellants' briefs, imposes a franchise tax upon railroad companies measured by their gross receipts derived from activities carried on solely within the physical confines of the State of Maryland. Predecessor statutes have imposed a like tax since 1872 without objection on the grounds urged here. An annual report of such receipts is required to be made to the Maryland State Tax Commission by Section 96 of Article 81 of the Annotated Code of Maryland (1939 Edition). Pursuant to the applicable statutory procedure, the Appellees made a tentative assessment of the gross receipts tax liability of both Appellants. Before this tentative assessment could become final, the Appellant Canton applied to the Appellees for a reduction of the tentative assessment in an amount equal to its gross receipts and operating revenues derived from its import and export business and operations in foreign commerce. The Appellant Western Maryland protested the inclusion of

gross receipts earned from transportation service to imports and exports in the measure of the tax and filed amended returns for the years in question, eliminating gross receipts derived from the transportation of imports and exports.

The Appellees conducted a formal hearing with respect to the protests of the Appellant Canton and the Appellant Western Maryland and, in reliance on an opinion of the Attorney General of Maryland, rejected the contention of both Appellants that the inclusion of gross receipts and operating revenues derived from the transportation of imports and exports contravened Article I, Section 10, Clause 2 of the Constitution of the United States (hereinafter called the "Import-Export Clause").

Both Appellants, in accordance with Section 194(b) of Article 81 of the Annotated Code of Maryland (1939 Edition), entered appeals to the Circuit Court No. 2 of Baltimore City, where the contention that the inclusion of gross receipts and operating revenues derived from transportation imports and exports contravened the Import-Export Clause of the Constitution of the United States was renewed. The Circuit Court No. 2 of Baltimore City, after consideration of the record of the hearing before the Appellees and extensive argument thereon, duly filed written opinions deciding that the final assessment made by the Appellees against the Appellant Canton for the year 1947 (on gross receipts earned during the calendar year 1946) and the final assessment made against the Appellant Western Maryland in the years 1946 and 1947 (on gross receipts earned in the calendar years 1945 and 1946) were valid and did not contravene the Import-Export Clause of the Constitution of the United States. Further appeals were taken by both Appellants from these decisions to the Court of Appeals of Maryland, the highest Court of the State of

Maryland, where it was again contended that the inclusion of gross receipts and operating revenues derived from the transportation and handling of imports and exports in the measure of the tax was a violation of the Import-Export Clause of the Constitution of the United States. The appeals were consolidated and the Court of Appeals (two of its six members dissenting) entered its opinion and order holding, in substance, that the assessments of the Appellees did not contravene the Import-Export Clause.

This Court's jurisdiction is invoked under the provisions of Section 1257(2) of Title 28, U. S. C. A., upon the alleged ground that the gross receipts tax imposed by Section 95 of Article 81, *supra*, in so far as it applies to gross receipts and operating revenues derived from the transportation of imports and exports contravenes Article 1, Section 10, Clause 2 of the Constitution of the United States.

In this Court, for the first time, the Appellant Canton makes the contention that Article I, Section 8 of the Constitution of the United States (the Commerce Clause) is also violated by Section 95 of Article 81, *supra*. The record is clear that this contention was not presented to nor considered by the Appellees as constituting the State Tax Commission of Maryland, the Circuit Court No. 2 of Baltimore City or the Court of Appeals of Maryland. The Agreed Statement of Facts entered into between the Appellant Canton and the Appellees shows that before the Appellees, as constituting the State Tax Commission of Maryland, the only contention made was "* * * that a gross receipts tax calculated on an assessment which included such gross receipts and operating revenues [that is gross receipts and operating revenues derived from import and export business and operations in foreign commerce], would contravene the said Import-Export Clause of the Constitution of the United States" (Canton R. 19). Before

the Circuit Court No. 2 of Baltimore City, the Agreed Statement of Facts shows that the only contention made was that the operating revenues and gross receipts derived by the Appellant Canton in the calendar year 1946 derived from the Appellant Canton's import and export business "* * * contravened the Import-Export Clause of the United States Constitution" (Canton R. 30). The majority opinion of the Court of Appeals of Maryland similarly discloses that the only contention presented and decided was with respect to certain portions of the gross receipts of both Appellants, and particularly whether those "* * * portions alleged to have been derived from their services rendered 'in the importing and exporting process' should not have been included within the total amount of the gross receipts subject to the tax" because of an alleged immunity afforded by Article I, Section 10, Clause 2 of the Constitution of the United States (Canton R. 36). The dissenting Judges of the Maryland Court of Appeals, moreover, found that the record before them did not present any contention founded upon the Commerce Clause (Canton R. 50).

While this Court undoubtedly has jurisdiction under Section 1257(2) of Title 28, U. S. C. A., with respect to the validity of the application of the tax imposed by Section 95 of Article 81, *supra*, to the operating revenues and gross receipts derived by both Appellants for the transportation within the State of Maryland of imports and exports, the issue presented to this Court is limited to that narrow point and does not include possible considerations of the effect of the Commerce Clause of the Constitution of the United States asserted for the first time in the Appellant Canton's Assignment of Errors, *White River Lumber Co. v. Arkansas, ex rel. Appelgate*, 279 U. S. 692, 700 (1929);

Whitney v. California, 274 U. S. 357, 362-3 (1927); *Hiawasee River Power Co. v. Carolina-Tennessee Power Co.*, 252 U. S. 341, 344 (1920); *Thomas v. Iowa*, 209 U. S. 258 (1908).

STATEMENT OF THE CASE

The Appellees accept the statement of the case contained in the brief of each of the Appellants. They point out, however, that neither Appellant is engaged in manufacturing, buying or selling goods which are either imported or exported. Both Appellants are engaged solely in affording transportation and related services, under instructions from others who are engaged in buying and selling imports and exports, to articles which, in the geographical sense, will become exports or have been imported. The formulation and control of shipping instructions given to the Appellants with respect to these articles rests exclusively in others.

The activities of the Appellants which produce the gross receipts claimed to be exempt from taxation were all carried on solely within the physical confines of the State of Maryland. These activities were performed in connection with, in the case of the Appellant Western Maryland, other general transportation activities conducted within and without the State of Maryland; but in the computation of the portion of the total gross receipts derived by the Appellant Western Maryland, subject to the Maryland gross receipts tax, the portion of total gross receipts earned by the Appellant Western Maryland without the State of Maryland has been eliminated. The Appellant Canton performs general transportation services in the State of Maryland, but no services outside the State.

SUMMARY OF ARGUMENT

I.

The gross receipts tax here assailed is by decision of the Court of Appeals of Maryland and proper construction of the statutes of the State of Maryland a franchise tax in lieu

of all other State taxes, except a purely nominal tax for the general franchise to be a corporation. It is proportionate in amount to the other State taxes which it supplants and which would be required to be paid by the Appellants were the franchise tax not paid. It is not a tax upon gross receipts as such, nor an occupation tax. Nothing contained in the Import-Export Clause of the Constitution of the United States, or in the decisions of this Honorable Court construing that clause, prohibits the imposition of an in lieu franchise or commutation tax measured by the gross receipts derived from transportation services performed solely within the physical confines of the State of Maryland to imports and exports.

The Appellant Western Maryland does not dispute that the gross receipts tax in question is an in lieu franchise or commutation tax. The Appellant Canton, however, claims, in the alternative, that the tax is not an in lieu franchise or commutation tax but that it is a privilege tax sought to be exacted for the granting of a privilege, which the State of Maryland is without constitutional authority to withhold, and that the tax is not comparable in amount to other State taxes which the Appellant Canton would otherwise be required to pay.

II.

Even if construed as a tax upon the gross receipts themselves rather than an in lieu franchise or commutation tax, the tax here assailed, as applied to gross receipts and operating revenues derived from transportation of imports and exports, does not contravene the Import-Export Clause of the Constitution of the United States. The tax is not upon the imports or exports nor upon any incident thereof so closely connected thereto as to constitute a tax upon the articles themselves. Under applicable decisions of this Honorable Court, the scope of the protection of the Import-

Export Clause of the Constitution of the United States falls short of the gross receipts derived by an independent carrier, having no interest in the goods, for transportation services afforded to such goods solely within the confines of the taxing State.

ARGUMENT

I.

THE TAX HERE ASSAILED IS A FRANCHISE TAX IN LIEU OF ALL OTHER STATE TAXES AND DOES NOT CONTRAVENE THE IMPORT-EXPORT CLAUSE OF THE FEDERAL CONSTITUTION.

In a long line of cases, the Court of Appeals of Maryland has held that the tax imposed by Section 98 of Article 81 of the Annotated Code of Maryland (1943 Supplement) is a franchise tax in lieu of all other State taxes, except the franchise tax imposed by Section 144 of Article 81 of the Annotated Code of Maryland (1947 Supplement) on the general franchise to be a corporation, *State v. B. & O. Railroad Co.*, 48 Md. 49 (1878); *Cumberland v. Pennsylvania Railroad Co.*, 92 Md. 668 (1901); *State v. U. S. F. & G. Co.*, 93 Md. 314 (1901); *State v. Central Trust Co.*, 106 Md. 268 (1907); *Postal Telegraph Cable Co. v. Harford County*, 131 Md. 96 (1917); *Rogan v. B. & O. Railroad Co.*, 188 Md. 44 (1947); *State Tax Commission v. Western Maryland Railway Co.*, 188 Md. 240 (1947). In the instant case, the Court of Appeals reviewed its prior holdings and reaffirmed their decisions. At the outset of its opinion, the Court stated: "This Court in a long line of cases has sustained the statutory declaration * * * that the tax here in question is a franchise tax in lieu of all other State taxes". The concluding sentence of the majority opinion in the instant case reads as follows: "* * * we see no reason why a franchise tax measured by gross receipts, including receipts for foreign commerce, should be valid under one clause and not under the other, particularly where the tax is in lieu of other permitted taxes".

Examination of the taxing laws of the State of Maryland patently shows that the Court of Appeals was correct. The tax imposed by Section 95 of Article 81 is specifically determined in the very language of the relevant portion of the statute "* * * as a franchise tax * * *". Moreover, the statutes imposing general State taxes make it abundantly clear that this franchise tax is in lieu of such other taxes. By Section 7(15) of Article 81 of the Annotated Code of Maryland (1943 Supplement) railroads, with respect to their railroad property, are exempted from the shares tax (a State tax on personal property) and the State real estate tax on their operating property, including land. All gross revenues used as a measure of the franchise tax imposed by Section 95 of Article 81, *supra*, are excluded, by Section 223(m) of Article 81 of the Annotated Code of Maryland (1947 Supplement), from gross income subject to the Maryland income tax. In short, the only State property tax which the Appellants are required to pay is the general tax on corporate franchises measured by Section 144 of Article 81 of the Annotated Code of Maryland, as amended by Chapter 42 of the Acts of the General Assembly of Maryland of 1949. This tax is purely nominal in amount, for on a capitalization of $10,000,000, a tax of only $400 is imposed and an additional tax of $30 for each $2,000,000 of capitalization or fractional part thereof in excess of $10,000,000.

If it is assumed, solely for the purposes of argument, that a tax directly upon the gross receipts derived from the transportation of imports and exports within the State of Maryland would be prohibited by the Import-Export Clause of the Federal Constitution, it does not follow that a tax imposed *on the franchise* of a railroad *measured* by the gross receipts derived from that type of activity *in lieu of all other State taxes* is objectionable. In dealing with cases arising under the Commerce Clause, this Court has consist-

ently held that an in lieu franchise or commutation tax is not objectionable even though it be measured in part by gross receipts derived from activities in interstate commerce, which, in themselves, could not be directly taxed, if the amount of tax obtained thereby reasonably approximates the amount of property tax which the State could constitutionally exact. This principle is directly applicable to the cases at bar even though they arise under the Import-Export Clause of the Federal Constitution when the basis upon which it rests is laid bare.

That an in lieu franchise or commutation tax on apportioned gross receipts is not invalid under the Commerce Clause has been established by *Maine v. Grand Trunk Railroad Co.*, 142 U. S. 217 (1891), as explained in *Postal Cable Co. v. Adams*, 155 U. S. 688 (1895) and *Galveston, Harrisburg, San Antonio Railway Co. v. Texas*, 210 U. S. 217 (1908); *U. S. Express Co. v. Minnesota*, 223 U. S. 335 (1912); *Cudahy Packing Co. v. Minnesota*, 246 U. S. 450 (1918); *Northwestern Life Insurance Co. v. Wisconsin*, 247 U. S. 132 (1918); *Great Northern Railway Co. v. Minnesota*, 278 U. S. 503 (1929); *Illinois Central Railway Co. v. Minnesota*, 309 U. S. 157 (1940). See also, *Ficklen v. Taxing District of Shelby County*, 145 U. S. 1 (1892); *State Tax on Railway Gross Receipts*, 15 Wall. 284 (1873); and *American Manufacturing Co. v. St. Louis*, 250 U. S. 459 (1919). The rationale of these cases is firmly established: A tax on property employed in interstate business is valid, and a tax in lieu of such a valid tax is itself valid if it amounts to a just substitute therefor, notwithstanding that the tax ultimately increases the cost of doing interstate business.

Reference need be made to only a few of the in lieu franchise or commutation tax cases to demonstrate that such taxes are sustained entirely on the principle that the tax is in substitution and a just equivalent for a property tax

as to which there could be no successful constitutional attack. For example, in the *Galveston* case, *supra*, the Court stated that an ad valorem property tax on real and personal property used in interstate commerce is valid. The Court then continued in characterizing earlier decisions by stating that "* * * taxes on such property have been sustained that took account of the augmentation of value from the commerce in which it was engaged". In the *United States Express Company* case, *supra*, the Court, in sustaining an in lieu gross receipts tax said:

> "The right of the State to tax property, although it is used in interstate commerce is entirely well settled. * * * The difficulty has been, and is, to distinguish between legitimate attempts to exert the taxing power of the State and those laws which, though in the guise of taxation, impose real burdens upon interstate commerce. * * *
>
> " 'But whatever name the exaction may be called if it amounts to no more than the ordinary tax upon property, or a just equivalent therefore, ascertained by reference thereto, it is not open to attack as inconsistent with the Constitution.' * * *".

The *Cudahy Packing Company* case, *supra*, was concerned with a gross receipts tax imposed upon a freight line company doing an interstate business within the State of Minnesota. In sustaining the tax, the Court stated:

> "Insofar as the property constituting this car line is regularly or habitually used or employed in Minnesota it is within the taxing power of the State, although chiefly devoted or applied to interstate transportation. * * * This is not questioned; but it is insisted that the tax imposed is not a property tax, but one laid directly on the gross earnings. Of course, if it is laid on the earnings as such, they being derived largely from interstate commerce, it is an unconstitutional restraint or burden on such commerce and void. * * * On the other

> hand, if what is done is to reach the property, and not to tax the gross earnings, the latter being taken merely as an index or measure of the value of the former, it well may be that the objection urged against the tax is untenable; for, as this court has said: 'By whatever name the tax or taxes may be called that are fixed by reference to the value of the property, if they are not imposed because of its use in interstate or foreign commerce, and if they amount to no more than would be legitimate as an ordinary tax upon the property, valued with reference to the use in which it is employed, they are not open to attack' as restraining or burdening such commerce * * *."

Finally, in the *Great Northern Railway Company* case, *supra*, which was concerned with a tax measured by gross earnings in lieu of all other taxes upon property and in which the tax was sustained, it was stated:

> "* * * It is competent for the State to impose a tax upon the property of the company within the State and for that purpose to measure the value of such property in the way here provided. We find nothing in the record to indicate that the tax under consideration, plus that already collected, exceeds 'what would be legitimate as an ordinary tax on the property valued as part of a going concern, [or is] relatively higher than the taxes on other kinds of property'. * * *
>
> "Under these circumstances, upon principles established by numerous decisions of this court, the tax is not open to challenge as an exaction in violation of the Federal Constitution. * * *"

A direct analogy exists between the validity of in lieu franchise or commutation taxes under the Commerce Clause and the in lieu franchise or commutation tax in the cases at bar under the Import-Export Clause, because it has been made clear that ad valorem property taxes on both tangible and intangible personal property used in, or derived from, the import-export process are not prohibited by

the Import-Export Clause, *W., P. & Cincinnati Transport Co. v. Wheeling*, 98 U. S. 273 (1879); *New York v. Wells*, 208 U. S. 14 (1908) and it can be shown that the tax in the cases at bar is comparable in amount to the ad valorem taxes which the State of Maryland would otherwise impose.

The *Wheeling* case concerned the validity of a State tax upon vessels used in the import-export traffic. Briefly, the opinion shows that the City of Wheeling imposed a personal property tax upon vessels in the amount of $.50 on every $100. of the assessed valuation thereof. An attack on the validity of the levy was made on the theory that the taxes amounted to a "duty of tonnage", prohibited by the clause of the Constitution of the United States next succeeding the Import-Export Clause and treated as having the same effect as the Import-Export Clause as appears from the Court's opinion. In its opinion, the Court stated:

> "Power to impose taxes for legitimate purposes resides in the States as well as in the United States; but the States cannot, without the consent of Congress, lay any duty of tonnage, nor can they levy any imposts or duties on imports or exports except what may be absolutely necessary for executing their inspection laws, as without the consent of Congress they are prohibited from exercising any such power. Outside of these prohibitions the power of the States extends to all objects within their sovereign power, except the means and instruments of Federal government * * *.
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> "Taxes levied by a State upon ships or vessels as instruments of commerce and navigation are within the clause of the Constitution which prohibits the States from levying any duty of tonnage without the consent of Congress; * * *.
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> * * * * * *
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> "* * * Tonnage duties cannot be levied; but it is too well settled to admit of question that taxes levied by a State, upon ships or vessels owned by the citizens of

the State, as property, based on a valuation of the same as property, to the extent of such ownership, are not within the prohibition of the Constitution.

* * * * * *

"Annual taxes upon ships and vessels for the support of the State Governments as property, upon a valuation as other personal property, are everywhere laid; nor is it believed that it requires much argument to prove that the opposite theory is unsound and indefensible in principle, as it is contrary to the generally received opinion, and wholly unsupported by any judicial determination. Instead of that, there are many cases in which the courts, in refuting the authority of the States, to lay duties of tonnage, have admitted that the owners of ships may be taxed to the extent of their interest in the same, for the value of the property. * * *"

The Court referred to many of the texts upon the subject, as well as statements contained in various cases. It relied, *inter alia*, upon a decision of the Court of Appeals of Maryland in *Howell v. State*, 3 Gill 14 (1845), as authority for the proposition that vessels are subject to taxation by the states as personal property and the states' power in that respect is not superseded by the Import-Export Clause. The Court concluded that the tax which it was considering was a tax on personal property and that it was not a duty of tonnage prohibited by the Federal Constitution.

In the *Wells* case, *supra*, the City of New York assessed, for ad valorem personal property taxes, office furniture, cash on hand in bank, accounts receivable and accounts payable of a taxpayer engaged in the business of importing. In short the assessment was upon the capital of an importing business. The taxpayer resisted the assessment as to cash on hand and in bank, accounts receivable and accounts payable on the theory that the taxes were essentially taxes upon the sale of imports and in violation of the Import-Ex-

port Clause, as construed in *Brown v. Maryland*, 12 Wheat. 419 (1827). The taxpayer's contention was not sustained by the Court. In sustaining the validity of the tax, the Court stated:

> "The power of the State of New York to impose a tax upon the cash and these notes as capital employed in the business within the State, laying aside for the moment the question as to their character as proceeds of the sale of imports, cannot be doubted in view of the previous decisions of this court. * * *
>
> "The constitutional protection as we have seen, is intended to secure the right to bring in, and to sell in the original packages, the goods imported; and, that this right may not be impaired, direct taxes upon goods or license taxes for the privilege of sale cannot be levied; and the decision in Brown v. Maryland recognizes that the importers may lose this right of protection by mingling such goods with other property, and altering their character as importations in original packages, and making them by his conduct subject to the taxing power of the State. And we think the same principle may be applied to the proceeds of the sale of the goods, which, while not directly taxable as such, any more than the goods themselves, may be dealt with by the owner in such wise as to become subject to taxation as other property.
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> * * * * * *
>
> "We think the constitutional protection afforded the importer against state action does not require the property thus held and used to be exempted from state taxation. * * *"

The Maryland franchise tax measured by gross receipts imposed in lieu of all other State taxes can be demonstrated to be proportionate in amount to other State taxes which the Appellants would be required to pay were not the tax in the case at bar imposed. In the Court of Appeals of Maryland, the Appellant Canton argued that the tax in the case

at bar was not comparable in amount to other State taxes. In its brief, it states that the tax is over "ten times greater than" ordinary ad valorem taxes (Appellant Canton Brief p. 28). The basis for the argument was the application of the ordinary rate of State taxes to the assessed value of the land and operating property of the Appellant Canton. The argument overlooked the effect of Chapter 965 of the Acts of the General Assembly of Maryland of 1945 (substantially reenacted, except as to rates, by Chapter 677 of the Acts of the General Assembly of Maryland of 1947 and codified as Sections 7(15), 25(h), 94½ and 95 of Article 81 of the Annotated Code of Maryland, 1947 Supplement).

These Acts were adopted by the General Assembly of Maryland pursuant to the constitutional authority of the State of Maryland to constitute railroad property a special class for tax purposes and to impose on such property a tax different in amount from the taxes imposed on other property throughout the State. *Nashville v. Browning*, 310 U. S. 362 (1940); *Ohio River & W. R. Co. v. Dittey*, 232 U. S. 576 (1914).

It was argued by the Appellees in the Court of Appeals of Maryland that when the rate of tax established by Chapter 965 and Chapter 677 of the Acts of the General Assembly of Maryland, *supra*, was applied to the admitted value of the Appellant Canton's property for the calendar year in which the tax under attack in the case at bar was imposed the amount of ad valorem taxes would be greater than the amount of the franchise tax sought to be sustained. The Court of Appeals adopted the Appellees' argument and said:

> "Canton also contends that the tax here in question is not a franchise tax in lieu of property taxes because it is not proportionate in amount to the property taxes to which it would have been liable. Canton bases this argument on the fact that if the ordinary rate of State

taxes is applied to the assessed value of its property for the calendar year 1946 its taxes would have been $3800.00 while its gross receipt taxes for that period amount to $39,092.00. Appellee points out in its brief that when Chapter 965 of the Acts of 1945, (substantially reenacted, except as to rates, by Chapter 677 of the Acts of 1947 and codified as Sections 7(15), 25(h), 94½ and 95 of Article 81, 1947 Supplement of the Code), is taken into consideration Canton's ad valorem property tax for the calendar year of 1946, as taxes on operating property, including land, would have been $40,681.00, an amount of $1000.00 'more than the amount of gross receipt taxes imposed for the gross receipts derived during that calendar year.' Nashville C. & St. L. Ry. v. Browning, 310 U. S. 362. Ohio River & W. R. Co. v. Dittey, 232 U. S. 576."

It should be noted that this finding of the Court of Appeals of Maryland related only to ad valorem property taxes which the Appellant Canton would be required to pay. It did not take into consideration additional income taxes which the Appellant Canton would be required to pay were the gross receipts used as a measure for the franchise tax not deducted from its gross income subject to the Maryland Income Tax Law.

If a direct ad valorem tax on property used in the importing-exporting process and the proceeds derived from that process are not barred by the Import-Export Clause, and the Appellants do not suggest otherwise, *a fortiori*, it follows that a franchise tax in lieu of such direct ad valorem taxes is constitutionally valid, where, as has been shown, the franchise tax is comparable in amount to the ad valorem taxes which would have been imposed. The analogy urged by the Appellees is supported collaterally by past decisions of this Court.

A franchise tax, as applied to a foreign corporation doing business in New York, measured by the extent of capi-

tal, including imports in their original packages, was sustained in *New York, ex. rel. Parke, Davis & Co. v. Roberts*, 171 U. S. 658 (1898). It was argued that the tax could not be sustained at least insofar as based upon the value of imports stored in their original packages on the authority of *Brown v. Maryland, supra.* The Contention was rejected, however, the Court saying:

> "But that case is inapplicable. Here no tax is sought to be imposed directly on imported articles or on their sale. This is a tax imposed on the business of a corporation, consisting in the storage and distribution of various kinds of goods, some products of their own manufacture and some imported articles. From the very nature of the tax, being laid as a tax upon the franchise of doing business as a corporation, it cannot be affected in any way by the character of the property in which its capital stock is invested * * *."

As late as 1948, in *Commonwealth v. Bayuk Cigars*, 359 Pa. 210, 58 A. (2d) 445, the *Roberts* case, *supra*, was cited with approval and relied on in sustaining a state franchise tax on a Maryland corporation measured by its capital when part of that capital consisted of imports in their original packages.

Also, it is interesting to note that in *Crew Levick Co. v. Pennsylvania*, 245 U. S. 292 (1917), where an annual mercantile license tax of $3.00, with an additional fee based upon a percentage of gross sales, was considered, the tax was condemned under the Import-Export Clause, as well as under the Commerce Clause because constituting a direct tax on sales. In condemning the tax, however, upon this dual basis, the Court was exceedingly careful to remark:

> "* * * So obvious is the distinction between this tax and those that were sustained in * * * (citing the in lieu franchise tax cases discussed *supra*) and some other cases of the same class, that no time need be spent upon it."

Needless to say, the tax considered in the *Crew Levick* case bore no semblance of the attributes of a franchise tax in lieu of other taxes. It is submitted, however, that this Court recognized that a gross receipts tax as a franchise tax in lieu of other taxes was valid even though, as the Appellees contend, it be assumed that the gross receipts themselves would not be taxable under the Import-Export Clause. See also the powerful and well reasoned dissents of Justice Cardozo, Brandeis and Stone in *Anglo-Chilean Nitrate Sales Corp. v. Alabama*, 288 U. S. 218 (1933), who would have sustained a State franchise tax measured by the volume of business which consisted of selling imports in their original packages; and the New York case of *People, ex rel. American Soda Fountain Co. v. Roberts*, 158 N. Y. 168, 52 N. E. 1104 (1899), which sustained a New York franchise tax measured in part by the value of articles to be exported.

The Appellants resist the application of the in lieu or commutation tax principle to the tax imposed in the cases at bar. They point to the words of the Import-Export Clause as prohibiting "any" tax on imports and exports. They argue that the prohibition against "any" tax applies to the whole "process" of importing and exporting and that when carried to its logical conclusion, the prohibition against "any" tax prohibits a franchise tax in lieu of all other State taxes measured, in part, by gross receipts derived from the "process" of importing and exporting, even though such tax be comparable in amount to the ad valorem State taxes which it supplants.

The Appellees, as will be more fully shown in the subsequent section of their argument, do not admit that a tax on the gross receipts of an independent carrier derived from services performed solely within the State of Maryland is prohibited by the Import-Export Clause when the articles

transported are imports and exports. However, if it be admitted that such a tax would be prohibited, such an admission does not prohibit or in any way detract from direct application of the in lieu or commutation tax principle. Such can easily be demonstrated by reference to the history of the development of the in lieu or commutation tax principle and current judicial principles at that time.

As was pointed out in *Richfield Oil Corporation v. State Board of Equalization*, 329 U. S. 69 (1946), the Import-Export Clause and the Commerce Clause have at times been construed identically. For example, in *Brown v. Maryland*, 12 Wheat. 49 (1827) and *Crew-Levick Co. v. Pennsylvania*, 245 U. S. 292 (1917), the Import-Export Clause and the Commerce Clause were treated as having the same effect.

To be sure, the in lieu or commutation tax cases were all specifically decided under the Commerce Clause. But they were decided at a time when the Commerce Clause was construed without qualification to prohibit all direct gross receipts taxes on gross receipts derived from interstate commerce. In the *State Freight Tax Case*, 15 Wall. 232 (1873), a Pennsylvania tax on freight, including interstate freight, at graduated rates per ton on different articles was held valid. In an opinion by the same Justice who delivered the opinion in the *State Freight Tax Case*, the *State Tax on Railway Gross Receipts Case*, 15 Wall. 284 (1873), held valid a Pennsylvania tax on railway gross receipts, including receipts from interstate commerce. These cases were essentially irreconcilable and the holding in the *State Tax on Railway Gross Receipts Case* was put to rest and, in effect, overruled in *Philadelphia and Southern Steamship Co. v. Pennsylvania*, 122 U. S. 326 (1887). Thereafter, during the entire period that the in lieu or commutation

tax cases were decided, the State of the law was crystal clear that no State could constitutionally impose a gross receipts tax directly on gross receipts derived from interstate commerce.

The state of the law is succinctly described in Powell, *More Ado About Gross Receipts Taxes*, 60 Harvard Law Review 501 (1947), as follows:

> "Prior to the decision in the *Berwind-White* case in 1940 and its possible foreshadowing in Mr. Justice Stone's opinion in the *Western Live Stock* case two years earlier, the canonical capsules for commerce-clause limitations on state taxation of gross receipts from interstate transportation and interstate sales were tolerably clear, notwithstanding frequent disagreements and possible disparities in the judicial prescriptions of the powders put inside them. The tax was adjudged invalid if it were determined to be imposed on such interstate transportation or interstate sale or on the gross receipts from transportation, communication, or sale. * * *" (Footnotes omitted).

As pointed out by Professor Powell, not until the decision in *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U. S. 33 (1940) and subsequent cases was there any departure from this ruling. Compare, however, *Freeman v. Hewit*, 329 U. S. 249 (1946); *Central Greyhound Lines v. Mealey*, 334 U. S. 653 (1948). See also, as to the present state of the law, the opinion of Mr. Justice Reed, concurred in by the Chief Justice, Mr. Justice Frankfurter and Mr. Justice Jackson in *Interstate Oil Pipe Line v. Stone*, 337 U. S. 622, 669-682 (1949).

Thus, from 1887, the date of the decision in *Philadelphia and Southern Steamship Co. v. Pennsylvania*, *supra*, until at least 1940, gross receipts from interstate commerce were

sacrosanct as far as the constitutional right of any State to impose a direct tax thereon. Yet, during this entire period, the in lieu or commutation tax cases from *Maine v. Grand Trunk Railroad Co.*, 142 U. S. 217 (1891), as explained in *Postal Cable Co. v. Adams*, 155 U. S. 688 (1895) and *Galveston, Harrisburgh & San Antonio Railway Co. v. Texas*, 210 U. S. 217 (1908) to *Illinois Central Railway Co. v. Minnesota*, 309 U. S. 157 (1940) were decided.

The Appellants rely upon *Richfield Oil Corporation v. State Board*, 329 U. S. 69 (1946), as authority for the proposition that the Commerce Clause technique, namely—the in lieu or commutation tax principle, cannot be applied to cases arising under the Import-Export Clause. While the *Richfield* case holds that the two constitutional provisions while related are not co-terminus and that qualifications may be written into the Commerce Clause which may not be written into the Import-Export Clause, that holding must be read in terms of exceptions recognized to exist in the absolute protection afforded by the Commerce Clause since the decision of this Court in *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U. S. 33 (1940). The *Richfield* case, however, does not indicate that in lieu or commutation tax principle is not applicable to gross receipts tax cases arising under the Import-Export Clause because that principle was developed against a background the same absolute prohibition by the Commerce Clause of any State taxes directly on gross receipts derived from interstate commerce which the Appellants claim is now afforded by the Import-Export Clause.

Thus, it appears that by the statute and Court decisions the Maryland gross receipts tax is a franchise tax imposed

in lieu of all other State taxes. It is comparable in amount to the rate at which the property would have been taxed if ad valorem taxes were imposed. Under such circumstances, State taxes have been sustained against attack based upon the Commerce Clause upon the theory that, if the ad valorem tax would have been permitted, an in lieu type of gross receipts tax comparable in amount is constitutionally valid. With respect to contentions based upon the Import-Export Clause, it has been determined that ad valorem property taxes are immune to constitutional attack. By judicial authority and direct analogy to the in lieu or commutation tax cases arising under the Commerce Clause, it is submitted the tax in the instant cases should be sustained.

II.

EVEN IF THE TAX HERE ASSAILED IS CONSTRUED AS A DIRECT TAX ON GROSS RECEIPTS DERIVED FROM THE IMPORTING AND EXPORTING PROCESS, THE TAX DOES NOT CONTRAVENE THE IMPORT-EXPORT CLAUSE OF THE FEDERAL CONSTITUTION.

It is the Appellees' contention that the reserved power of the State of Maryland to tax subjects and objects within its confines applies in the cases at bar to that portion of the gross receipts received by the Appellants claimed to be received from the "process" of importing and exporting The Appellees' contention and the Appellants' contentions in this respect call for a consideration of the extent of the State of Maryland's power to tax and a precise delineation on the facts presented by the cases at bar of the scope of the prohibition against State taxation contained in the Import-Export Clause of the Federal Constitution.

It is well to consider the historic words of Chief Justice Marshall in this connection, as set forth in *Brown v. Mary-*

land, 12 Wheat. 419 (1827). That case concerned an Act of the Maryland Legislature, which imposed on all importers of foreign articles the requirement of a license to be had by payment of a license fee. The validity of the tax was assailed on the theory that it constituted a duty on imports. In support of the tax, it was argued that the Import-Export Clause had no application and the conceded power of the State of Maryland to tax subjects and objects within its jurisdiction was not thereby limited. Chief Justice Marshall said in this respect:

> "It may be conceded that the words of the prohibition ought not to be pressed to their utmost extent; that in our complex system, the object of the powers conferred on the government of the Union, and the nature of the often conflicting powers which remain in the states, must always be taken into view, and may aid in expounding the words of any particular clause. But, while we admit that sound principles of construction ought to restrain all courts from carrying the words of the prohibtion beyond the object the constitution is intended to secure, that there must be a point of time when the prohibition ceases, and the power of the state to tax commences; we cannot admit that this point of time is the instant that the articles enter the country. It is, we think, obvious, that this construction would defeat the prohibition.
>
> "The constitutional prohibition on the states to lay a duty on imports—a prohibition which a vast majority of them must feel an interest in preserving—may certainly come in conflict with their acknowledged power to tax persons and property within their territory. *The power, and the restriction on it, though quite distinguishable when they do not approach each other, may yet, like the intervening colors between white and black, approach so nearly as to perplex the understanding, as colors perplex the vision in marking the dis-*

> *tinction between them. Yet the distinction exists, and must be marked as the cases arise.* Till they do arise, it might be premature to state any rule as being universal in its application. * * *" (Italics supplied.)

If the tax here assailed is construed as a tax directly on gross receipts derived from the transportation within the State of Maryland of articles previously imported or articles to be exported, the essential problem presented to this Court is whether the scope of the prohibition contained in the Import-Export Clause against "any" tax includes such a tax.

The Appellants' argument may be divided into two steps. They argue that the transportation services which they perform are part of the "process" of importing and exporting and, secondly, that the entire "process" of importing and exporting is by decision of this Court tax immune. In this respect, the Appellants fall into the error with which they charge the Appellees; namely, application of the Commerce Clause technique, which is founded upon the general grant of power to the Congress to regulate commerce, itself a process, to a provision of the Federal Constitution prohibiting taxes on certain designated articles. Of course, the Appellees do not contend at this time that the Import-Export Clause affords tax immunity only to physical imports and exports. It is clear that such immunity extends not only to the objects themselves but to incidents thereof so closely related thereto that a tax imposed on such incidents *amounts to a tax on the articles themselves.* In dealing with the decisions of this Court construing the Import-Export Clause, it is clear, however, that this is the terminus of the exemption line and that each of the component parts of the "process" of importing and exporting, is not, as such, necessarily tax exempt.

To establish the validity of the Appellees' contention, it is necessary to consider those cases which have sustained the validity of various types of taxes against attacks based upon the Import-Export Clause, those cases which have declared invalid various types of taxes because of the Import-Export Clause, and particularly those authorities especially relied upon by the Appellants, as well as those cases applying the controlling principle to other, though analogous, sets of fact.

(a) Cases Sustaining Taxes Against Import-Export Clause Attack

One of the earlier and more celebrated decisions of this Court was concerned with an attack on the validity of an Act of the Pennsylvania Legislature regulating the use of pilots and fixing pilotage fees and fees to be paid when pilots were not used, based upon the alleged effect of the Import-Export Clause, *Cooley v. Board of Wardens*, 12 How. 299 (1851). As before stated, the Act in question required vessels above a certain size sailing from or bound to any port not within the Delaware River to take on a pilot and to pay appropriate pilotage fees. The Act further provided that if the master of any ship shall refuse or neglect to take on a pilot, he shall pay a sum equal to half of the pilotage to be used for the Society of the Relief of Distressed and Decayed Pilots, Their Widows and Children.

Attack was made on the validity of the Act upon the ground, *inter alia*, that it imposed imposts or duties on imports or exports and duties on tonnage as prohibited by the Federal Constitution. These contentions, however, were overruled. The Court saying:

> "* * * we cannot yield our assent to the argument, that this provision of law is in conflict with the second and third clauses of the tenth section of the first article

of the Constitution, which prohibit a state, without the assent of Congress, from laying any imposts or duties on imports or exports or tonnage. *This provision of the Constitution was intended to operate upon subjects actually existing and well understood when the Constitution was formed. Imposts and duties on imports, exports, and tonnage were then known to the commerce of a civilized world to be as distinct from fees and charges for pilotage, and from the penalties by which commercial states enforced their pilot laws, as they were from charges for wharfage or towage, or any other local port charges for services rendered to vessels or cargoes;* and to declare that such pilot fees or penalties are embraced within the words imposts or duties on imports, exports or tonnage, would be to confound things essentially different, and which must have been known to be actually different by those who used this language. It cannot be denied that a tonnage duty, or an impost on imports or exports, may be levied under the name of pilot dues or penalties; and certainly it is the thing, and not the name, which is to be considered. But, having previously stated that, in this instance, the law complained of does not pass the appropriate line which limits laws for the regulation of pilots and pilotage, the suggestion, that this law levies a duty on tonnage or on imports or exports, is not admissible; * * *." (Italics supplied.)

Reference has been made at an earlier point in this brief to the cases which have sustained ad valorem property taxes imposed upon vessels in importing and exporting and upon the capital employed in an importing business, *W. P. & Cincinnati Transport Co. v. Wheeling*, 98 U. S. 273 (1879); *New York v. Wells*, 208 U. S. 14 (1908).

Not even every article to be exported is immune from an ad valorem property tax, as is shown by *Cornell v. Coyne*, 192 U. S. 418 (1904). That case was concerned with a nondiscriminatory tax imposed by the United States upon filled

cheese. The tax was imposed upon the manufacturers of the filled cheese.

The contention was made that the tax was prohibited because of the limitation on the power of Congress to impose taxes or duties on articles exported from any State contained in the fifth paragraph of Section 9 of Article I of the Federal Constitution, which, of course, limits the taxing power of Congress in the same manner as the Import-Export Clause limits the taxing power of the States. After reciting the text of the constitutional prohibition limiting the taxing power of Congress, the Court stated:

> "But this means that no burden shall be placed on exportation, and does not require that any bounty be given therefor. Congress has power to encourage exportation by remitting taxes on goods manufactured at home as it has power to encourage manufacturers by duties on imports, yet the Constitution does not compel it to do either the one or the other. * * * Subjecting filled cheese manufactured for the purpose of export to the same tax as all other filled cheese is casting no tax on or duty on articles exported, but is only a tax or duty on the manufacturing of articles in order to prepare them for export. While that which is asked in this case is the return of a manufacturing tax, there is nothing in the constitutional provision to distinguish between manufacturing and other taxes, and if the plaintiff's contention be sustained as to a manufacturing tax it would follow that the government was bound to refund all prior taxes imposed on articles exported. A farmer may raise cattle with the purpose of exportation, and in fact export them. Can it be that he is entitled to a return of all property taxes which have been cast upon those cattle? The true construction of the constitutional provision is that no burden by way of tax or duty can be cast upon the exportation of articles, and does not mean that articles exported are relieved from the prior ordinary burdens of taxation which rest

upon all property similarly situated. The exemption attaches to the export, and not to the article before its exportation. * * *"

Similarly, it is now well settled that the net proceeds of a taxpayer directly engaged in the business of importing and exporting are not immune to an income tax by operation of the Import-Export Clause or the clause prohibiting Congress from levying duties on exports. In *Peck & Co. v. Lowe*, 247 U. S. 165 (1918), the Federal Income Tax Act of 1913 as applied to a domestic corporation chiefly engaged in buying goods in the several States shipping them to foreign countries and there selling them was attacked, the contention being made that Congress was without power to impose a tax on the income derived thereby by virtue of the constitutional prohibition prohibiting it from levying imposts or duties on exports.

In its opinion, the Court examined at length cases which had sustained and cases which had held invalid taxes attacked under the Import-Export Clause and the prohibition against the levy by Congress of imposts or duties on exports. It then stated:

"The tax in question is unlike any of those heretofore condemned. It is not laid on articles in the course of exportation, or on anything which inherently or by the usages of commerce is embraced in exportation or any of its processes. On the contrary, it is an income tax laid generally on net incomes. And while it cannot be applied to any income which Congress has no power to tax * * * it is both nominally and actually a general tax. It is not laid on income from exportation because of its source, or in a discriminative way, but just as it is laid on other income. * * * At most, exportation is affected only indirectly and remotely. * * *"

While the *Peck* case was concerned with the provision of the Constitution limiting the power of Congress to tax,

the same result was reached in *National Paper & Type Co. v. Bowers*, 266 U. S. 373 (1924), with respect to a New York income tax imposed upon a domestic corporation engaged in the business of purchasing articles in the United States, transporting them to foreign countries and there selling them, against the contention that the States' power transgressed the prohibition of the Import-Export Clause.

(b) Cases Invalidating Taxes Because of Import-Export Clause Attack

While some of the ultimate limits of the protection afforded by the Import-Export Clause have been clearly shown by the cases referred to above, there are, conversely, a body of cases which show what types of taxes fall directly within the prohibition contained in the Import-Export Clause. These cases divide themselves into two groups. The first, taxes directly against an object itself. There, the problem is presented whether the object itself constitutes an import or an export within the meaning of the constitutional prohibition. Other cases invalidate taxes which, to varying degrees, although purporting to be taxes on other than imports or exports, in fact, constitute taxes upon objects which are imports or exports. Cases involving taxes of the first type are so clearly distinguishable from the Maryland gross receipts tax that they may be disposed of summarily.

(1) Cases Involving Direct Taxes on Imports and Exports

The earliest case involving a tax of this type was *Brown v. Maryland*, *supra*. The tax in this case purported to be a license tax on the occupation of importing. However, so far as the decision of the Court invalidating the tax is concerned, the tax was treated as an actual tax upon imports themselves. The case defined the since often-repeated origi-

nal package doctrine, in that it held that a direct tax on an import as such was invalid so long as the import was within the geographical confines of the United States in the original package or same form as that in which it entered the United States. "All must perceive that a tax on the sale of an article imported only for sale, is a tax on the article itself."

Crew Levick Co. v. Pennsylvania, 245 U. S. 292 (1917), concerned an annual mercantile license tax enacted by Pennsylvania in the amount of $3.00 and a certain percentage of gross receipts. A taxpayer engaged in the business of purchasing commodities within the United States and selling them in foreign countries attacked the validity of the tax on the theory that it constituted a regulation of foreign commerce and an impost upon exports. The taxpayer's contentions were adopted and the tax invalidated. The Court concluded that because the tax was imposed on the business of selling goods in foreign commerce and was based upon a gross receipt of sales it constituted "* * * a tax upon such commerce * * * in effect an impost or duty upon exports".

Similarly, on the basis that it constituted, as recognized by decisions of the State Court, a tax on imports, the tax was invalidated in *Anglo-Chilean Nitrate Sales Corp. v. Alabama*, 288 U. S. 218 (1933). There, a tax, construed by the Courts of Alabama to be not a franchise tax but a tax on the actual doing of business, was sought to be exacted from a corporation whose only business activities in the State of Alabama were the importing, storage and sale of nitrate in the form and packages in which it was put up abroad and transported into the United States. The decision in *Brown v. Maryland, supra*, was relied upon for the proposition that a tax on the sale of an article imported only for

sale is a tax on the article itself, and, on that basis, the tax was held to be a direct tax on imports themselves and hence invalid. *It is interesting to note that Justices Cardozo, Brandeis and Stone dissented upon the theory that under a proper construction of the State Court's decision concerning the nature of the tax it constituted a valid tax on the franchise of the taxpayer, measured by the value of its gross business.*

Spalding & Bros. v. Edwards, 262 U. S. 66 (1923), concerned a sales tax on baseballs. The tax was imposed by the State of New York under circumstances where the taxpayer had entered into an agreement to sell the baseballs and ship them to Venezuela. The taxpayer had marked the goods for delivery to the purchaser in Venezuela and delivered them to a carrier, from which it received a receipt, later exchanged for an export bill of lading.

The question involved was, of course, whether the tax was prohibited by the Export Clause of the Federal Constitution. In deciding this question, the Court pointed out, although the tax was non-discriminatory it would not thus be added if it was, in fact, a tax on articles exported from the State. The Court then stated that since it was concerned with a tax *on an object itself* "* * * we have to fix a point at which, in view of the purpose of the Constitution, the export must be said to begin". Upon a consideration of all of the facts which showed that the "Act that passed the title, and that would have incurred the tax had the transaction been domestic, committed the goods to the carrier that was to take them across the sea, for the purpose of export, and with the direction to the foreign port upon the goods" was the occasion for imposition of a tax. The Court concluded, therefore, the tax was one in form and substance upon exports and prohibited by the Import-Export Clause.

The latest case involving a direct tax on imports and exports themselves, other than the very late decisions particularly relied upon by the Appellants and hereinafter discussed, was *Hooven & Allison Co. v. Evatt*, 324 U. S. 652 (1945). There, the State of Ohio imposed ad valorem taxes on certain bales of hemp and other fibre brought from the Phillipine Islands. When assessed for the tax, the hemp and other fibres were stored in the original packages in which they had been imported in Ohio preliminary to their use by the taxpayer in the manufacture of cordage and other products. Again, upon the theory of *Brown v. Maryland*, *supra*, and upon the further holding that articles brought from the Phillipine Islands to the Continental United States constituted imports, the tax was condemned.

(2) Cases Involving Taxes on the "Process" of Importing and Exporting

The case to be considered under this sub-heading of the Appellees' brief are perhaps the most important referred to anywhere herein, for, as will be seen, these are the cases in which the language relied upon so heavily by the Appellants that the "process" of importing and exporting is exempted from taxation by the Import-Export Clause was developed. It is important to note in connection with each of these cases what act or document was the incident for the tax and particularly the relationship of the document or act to the article of import or export and the causal effect between a tax upon that act or document and the physical import or export itself.

Needless to say, it is now too late in the light of these cases to make the contention that the Import-Export Clause has reference only to physical imports and physical exports in themselves, notwithstanding that the language employed in the Constitution would logically lead to that conclusion.

In extending the protection of the Import-Export Clause to acts or documents other than the imports or exports themselves, it is submitted, this Court has consistently been guided by the comparatively limited scope of the language used in the Constitution itself. As appears from these cases, its use of the term "process" has not yet been to inject into the meaning of that word the usual meaning afforded it in every day speech and especially not the meaning afforded it in cases arising under the Commerce Clause, but rather such a specialized meaning as to constitute the word a word of art. When this principle is kept in mind in dealing with the following cases, the whole fallacy of the Appellants' argument that, in the abstract they were engaged in the importing and exporting process and that, consequently, gross receipts derived by them from these activities are tax exampt is brought to light.

In *Almy v. California*, 65 U. S. 169 (1861), a State stamp tax upon bills of lading was under consideration, as applied to bills of lading for the export of gold and silver. The validity of the tax was questioned upon the ground that, in substance and effect, the stamp tax imposed on bills of lading used for that purpose constituted a tax upon exports.

This contention was sustained by the Court in an opinion written by Mr. Chief Justice Taney, who stated:

> "* * * a tax or duty on a bill of lading, although differing in form from a duty on the article shipped, is in substance the same thing; for a bill of lading, or some written instrument of the same import, is necessarily always associated with every shipment of articles of commerce from the ports of one country to those of another. The necessities of commerce require it. And it is hardly less necessary to the existence of such commerce than casks to cover tobacco, or bagging to cover cotton, when such articles are exported to a foreign country; for no one would put his property

into the hands of a ship master without taking written evidence of its receipt on board the vessel, and the purposes for which it was placed in his hands. The merchant could not send an agent with every vessel, to inform the consignee of the cargo what articles he had shipped, and prove the contract of the master if he failed to deliver them in safety. *A bill of lading, therefore, or some equivalent instrument of writing, is invariably associated with every cargo of merchandise exported to a foreign country, and consequently a duty upon that is, in substance and effect, a duty on the article exported.* And if the law of California is constitutional, then every cargo of every description exported from the United States may be made to pay an export duty to the State, provided the tax is imposed in the form of a tax on the bill of lading, and this is in direct opposition to the plain and express prohibition in the Constitution of the United States." (Emphasis supplied.)

The same result was achieved at a later date in *Fairbanks v. United States*, 181 U. S. 283, (1901), with respect to a stamp tax enacted by Congress in its application to an export bill of lading upon certain wheat exported from Minnesota to England. This later case, of course, arose under the provision of the Constitution denying to Congress the right to tax exports rather than the Import-Export Clause of the Federal Constitution, which applies only to the States.

In much the same vein as the holdings in the *Almy* and *Fairbanks* cases, *supra*, was the decision in the case of *Selliger v. Kentucky*, 213 U. S. 200, (1909). That case involved a State ad valorem property tax sought to be imposed on certain warehouse receipts owned by the defendant, issued for and on account of whiskey which was physically present in Germany. The decision of the Court proceeds upon the assumption that the goods themselves would not have been subject to taxation because they were

physically outside of the situs of the State and also because the property was an export. Upon the theory that the property itself, while in Germany or even while in Kentucky preliminary to its actual exportation would have been tax exempt, the Court held the warehouse receipts were tax exempt.

After the *Selliger* case came two decisions upon which the Appellants place special reliance. The first, *United States v. Hvoslef*, 237 U. S. 1 (1915), concerned a United States stamp tax as applied to certain charter parties. The tax had been imposed by the War Revenue Act of 1898. Thereafter, Congress had enacted legislation authorizing the refund of taxes illegally assessed or collected.

The charter parties were exclusively for the carriage of cargo from ports in the States of the United States to foreign ports and the imposition of the stamp tax was resisted upon the theory that it constituted a tax or duty imposed by Congress on articles exported from a State. The tax was held invalid as applied to the charter parties exclusively for the carriage of cargo from State ports to foreign countries. In reaching this conclusion, the Court referred to the constitutional prohibition against the imposition by Congress of taxes or duties on exports. It then stated:

> "The prohibition relates only to exportation to foreign countries * * * and is designed to give immunity from taxation to property that is in the actual course of such exportation * * *. This constitutional freedom, however, plainly involves more than mere exemption from taxes or duties which are laid specifically upon the goods themselves. If it meant no more than that, the obstructions to exportation which it was the purpose to prevent could readily be set up by legislation nominally conforming to the constitutional restriction, but in effect overriding it. It was the clear intent of the

framers of the Constitution that 'the process of exporting the products of a state, the goods, chattels, and property of the people of the several states, should not be obstructed or hindered by any burden of taxation'."

The Court reviewed at length its prior decisions and particularly the *Almy and Fairbanks* cases, *supra*, involving taxes nominally on articles or documents other than imports or exports but found to be, in effect, invalid taxes on imports or exports. It then concluded by saying:

"Instead of a contract for the carriage of a particular lot of goods occupying less than the entire cargo space, as in the case of an ordinary bill of lading, the charter party was a contract for the carriage of a full cargo lot. In legal principle, there is no distinction which can condemn the tax in the one case and save it in the other. Whether the contract of carriage covers a small lot, or a partial cargo, or an entire cargo, whether the goods occupy a part of the cargo space or the whole cargo space,—can make no constitutional difference. The charters were for the exportation; they related to it exclusively; they served no other purpose. A tax on these charter parties was in substance a tax on the exportation; and a tax on the exportation is a tax on the exports."

Thames & Mersey Marine Insurance Co. v. United States, 237 U. S. 19, (1915), concerned the validity of the same tax considered in the *Hvoslef* case, as applied to contracts of marine insurance. As in the *Hvoslef* case and on its authority, the tax was also condemned as constituting a tax on exports.

The Court's opinion referred to the *Hvoslef* case, *supra*, and stated:

"* * * There the question was as to the validity of the tax upon charter parties which were exclusively for the carriage of cargo from state ports to foreign ports.

> and here the question is as to the tax upon policies insuring such exports during the voyage. Is the tax upon such policies so directly and closely related to the 'process of exporting' that the tax is in substance a tax upon the exportation and hence within the constitutional prohibition? *It is manifest that we are not called upon to deal with transactions which merely anticipate exportation, or with goods that are not in the course of being actually exported,* * * *" (Emphasis supplied.)

The Court then considered the use of Marine insurance in the carriage of goods to foreign countries. It found that the policy of insurance is "universally recognized as one of the ordinary 'shipping documents' ". It pointed out that during the war period of the Spanish American War the rise in rates for insurance affected exporting in the same manner as a rise in freight rates and concluded by saying:

> "* * * the taxation of policies insuring cargoes during their transit to foreign ports is as much a burden on exporting as if it were laid on the charter parties, the bills of lading, or the goods themselves. *Such taxation does not deal with preliminaries, or with distinct or separable subjects: the tax falls upon the exporting process.*" (Emphasis supplied.)

It is extremely important to note that in both the *Hvoslef* and *Thames & Mersey* cases, *supra*, the services to be performed, carriage of goods by sea in the first case and marine insurance during such carriage in the second, were all to be performed outside of the continental United States. The use by the Court of the term "process of exporting" must necessarily be read and understood in the light of this factual background for, in substance and effect, the term "process" is used as a word of art to mean those transactions, in the case of exports, which begin at dock side. Seizure by the Appellants upon the use of the word, "pro-

cess" to extend to the carriage of articles subsequently to be exported within the continental United States is unwarranted insofar as it depends upon the decisions in these two cases.

(3) The Richfield Case and Subsequent Decisions

The Appellants place special reliance upon *Richfield Oil Corporation v. State Board*, 329 U. S. 69, (1946) and three decisions following it, *Joseph v. Carter & Weekes Stevedoring Co.*, 330 U. S. 422 (1947), *Empresa Siderurgica, S. A. v. County of Merced*, 337 U. S. 154 (1949); *Joy Oil Co. v. State Tax Commission*, 337 U. S. 286 (1949). These cases deserve special analysis to see what, if any, new constitutional doctrine they establish and how they fit in and complete the picture presented by earlier decisions.

The *Richfield* case was a sales tax case. The tax involved therein applied to retail sales as defined and was measured in amount by a percentage of the gross receipts derived from the sale. On the facts, the validity of the tax was resisted as applied to a sale of oil made by Richfield Oil Corporation to the New Zealand Government. The price fixed for the sale was f. o. b. Los Angeles; payment to be made, however, in London. Delivery was to the order of the Naval Secretary of New Zealand and was to be made at a designated naval tank steamer of the Government of New Zealand at Los Angeles. The seller carried the oil by pipe line from its refinery in California to storage tanks at the harbor where the New Zealand naval vessel appeared to receive it. Thereafter, the oil was transported to New Zealand and no portion of it was used or consumed in the United States.

In considering the tax as applied to this transaction, the Court held that it violated the Import-Export Clause. It pointed out that the Supreme Court of California had sus-

tained the validity of the tax on the authority of certain Commerce Clause cases which, in substance, held that non-discriminatory taxes imposed on interstate sales were not prohibited by the Commerce Clause. The Court stated that cases arising under the Commerce Clause and cases arising under the Import-Export Clause were not interchangeable because the two constitutional provisions under which they arise "are not coterminus". In some cases, the Court remarked, a State tax has been held unconstitutional both under the Import-Export Clause and under the Commerce Clause; but it pointed out the essential difference between the two clauses meant that, in Commerce Clause cases the Court could sustain a tax applicable to interstate commerce if it found that it did not discriminate against, exact a tax for the privilege of engaging in or unduly burden such commerce, while, because of the specific language of the Import-Export Clause, "any" tax which constituted a tax on imports or exports was prohibited.

After this general statement, the Court stated that it was faced primarily with the question of whether the Oil constituted an export within the meaning of the constitutional provision. It reviewed earlier cases and, with specific reliance on the *Spalding & Bros.* case, *supra*, it held that "* * * the commencement of the export would occur no later than the delivery of the oil into the vessel". Upon that fact and the further finding that the tax constituted an impost, the statute, as applied to the transaction outlined, was condemned.

It is obviously apparent that the *Richfield* case established no new constitutional doctrine. It was but a continuation and logical extension of the cases involving direct taxes on imports and exports considered herein. The State admitted that the sale would have been exempt if the oil

had been delivered to a common carrier. *The actual point decided was that the delivery to the vessel of the Vendee began the Export.*

Subsequent to the *Richfield* case, came the decision in the *Carter & Weekes* case, *supra.* At the outset, it is important to note that this latter case was decided by the majority of the Court without any reference whatsoever to the Import-Export Clause, with the result of splitting the Court, although as plainly appears from the summary of the argument made to the Court in the Lawyers' Edition Report of the case (91 L. Ed. 993), the Import-Export Clause was argued to the Court.

This case involved the validity of an occupation tax measured by gross receipts as imposed on a company engaged in stevedoring operations. The service performed by the company had to do with the loading and unloading of imports and exports. The majority of the Court, as before stated, without any reference to the Import-Export Clause concluded the tax was invalid since it imposed an undue burden on foreign commerce and thus violated the implied prohibition contained in the interstate and foreign Commerce Clause of the Constitution. Mr. Justice Black dissented in toto from the majority opinion. Mr. Justice Douglas, Mr. Justice Rutledge and Mr. Justice Murphy dissented from the sole proposition contained in the majority opinion that the tax violated the Commerce Clause. Mr. Justice Douglas and Mr. Justice Rutledge concurred in part with the majority on the ground that the portion of the proceeds of the gross receipts derived from the loading and unloading of imports and exports was unconstitutional as in violation of the Import-Export Clause. The full text of their opinion on this latter point is contained in the Appellant Canton's brief, page 44, and will not be repeated here. In short, it was based upon the approach adopted by

both Appellants in the case at bar that loading and unloading are part of the exporting process and the Import-Export Clause prohibits not only taxes on imports and exports but safeguards all processes of, agents and instrumentalities engaged in the handling of imports and exports from taxation.

Needless to say, the case is not any authority for contentions founded upon the Import-Export Clause since the majority of the Court, with the result of creating a split and sharp dissent among its members, did not base its decision upon the Import-Export Clause or even mention that Clause although the point was argued to them.

The Appellants seek to convert the actual vote of the Court on the main point decided (5 to 4) into a 7 to 2 decision based upon the Import-Export Clause. Their reasoning is that a state tax may survive the Commerce Clause and not the Import-Export Clause, but the converse is not true. In this connection, the Appellants are basing their argument upon the statements contained in the partially concurring and partially dissenting opinion of Mr. Justice Douglas, with whom Mr. Justice Rutledge agreed, but with whom Mr. Justice Murphy and six other members of the Court failed to agree.

While it is true that Mr. Justice Douglas did state "* * * a state tax might survive the tests of validity under the Commerce Clause and fail to survive the Import-Export Clause", this language must be read in connection with the language employed by him in writing for the majority of the Court in the *Richfield* case, *supra*, when he said:

> "The two constitutional provisions, while related, are not coterminus. To be sure, a state tax has at times been held unconstitutional both under the Import-Export Clause and under the Commerce Clause. * * * But

there are important differences between the two. The invalidity of one derives from the prohibition of taxation on the import or export; the validity of the other turns no wise on whether the article was, or had ever been, an import or export. * * * Moreover, the Commerce Clause is cast, not in terms of a prohibition against taxes, but in terms of a power on the part of Congress to regulate commerce. * * * the scope of limitation [of the Commerce Clause] has been determined by the court in an effort to maintain an area of trade free from state interference and at the same time to make interstate commerce pay its way. * * * That accommodation has been made by upholding taxes designed to make interstate commerce bear a fair share of the cost of the local government from which it receives benefits * * * and by invalidating those which discriminate against interstate commerce, which impose a levy for the privilege of doing it, which place an undue burden on it. * * *

"It seems clear that we cannot write any such qualifications into the Import-Export Clause. It prohibits every State from laying 'any' tax on imports or exports without the consent of Congress. Only one exception is created—'except what may be absolutely necessary for executing its inspection laws'. The fact of a single exception suggests that no other qualification of the absolute prohibition was intended. It would entail a substantial revision of the Import-Export Clause to substitute for the prohibition against 'any' tax a prohibition against 'any discriminatory' tax. *As we shall see, the question as to what is exportation is somewhat entwined with the question as to what is interstate commerce. But the two clauses, though complementary, serve different ends. And the limitations of one cannot be read into the other.*" (Emphasis supplied.)

When the actual language employed in the Import-Export Clause is considered, together with the background decisions construing that Clause prior to the *Richfield*

case, the proposition contended for by the Appellants is without merit. The Import-Export Clause is phrased in words of taxes upon articles themselves. Obviously, as a practical matter and in order to preserve substance rather than form, the Supreme Court has condemned taxes under the Import-Export Clause which nominally purported to be on transactions or documents related to imports and exports and not on the articles themselves, although, in substance, the very imports and exports themselves were being taxed. In so doing, as has been shown before, the Supreme Court has on several occasions employed the phrase, the "process" of importing and exporting. The use of the word "process" in that language, however, has been an artful use and not a generic use, because obviously the Import-Export Clause, cast in the language adopted by the draftsmen of the Constitution, could not mean that in the generic sense every aspect of the process of importing and exporting is tax exempt. In this connection, the dissent of Mr. Justice Black in the *Richfield* case is important for there, in speaking of the Import-Export Clause, he stated flatly: "It was not intended to bestow a bounty or blanket tax immunity upon all those who engage in the production, processing, purchase, or sale of goods shipped abroad. There was no broad purpose of encouraging foreign commerce by making all these preliminary steps tax free."

As is true with respect to the *Richfield* case, *supra*, the *Empresa Siderurgica, S. A.* case, *supra*, likewise establishes no new constitutional doctrine. There, the question presented involved the application of a State personal property ad valorem tax as applied to a cement plant, in California, which had been sold in its entirety to a Columbian corporation for export to South America. The tax was imposed upon part of the plant at a time when title has passed, pos-

session taken by the purchaser and a company which was a common carrier employed to do the dismantling and packaging for shipment.

The principal problem presented by the case was whether or not the tax could be said to apply to an export. In other words, the Court was required to decide whether, on the state of facts that the plant was being disassembled and shipped to South America, the plant and its component parts could be said to constitute an export within the meaning of the Import-Export Clause and thus be exempt from the tax.

The Court decided that on the date of finality for tax purposes the facts did not establish that the plant and its component parts constituted exports. Accordingly, it held that imposition of the tax was proper. In so doing, it repeated its earlier general statements that the tax immunity under the Import-Export Clause "* * * runs to the process of exportation and the transactions and documents embraced in it. * * *". As authority for its statement, it relied upon the *Fairbanks, Thames & Mersey and Hvoslef* cases, *supra*, which, as have been shown, demonstrate that the word "process" is a word of art rather than one of generic meaning, as used under the Commerce Clause.

The *Joy Oil Company* case, *supra*, likewise concerned a personal property ad valorem tax. There, the taxpayer had purchased gasoline for export and in order to secure the benefits of lower export freight rates and exemption from the Federal transportation and manufacturers' excise taxes, had had the gasoline transported from Grand Rapids, Michigan, to Detroit, Michigan, where it was accumulated in storage tanks. From Detroit, the gasoline was to be shipped to Canada by water. However, the gasoline was stored in Detroit for some fifteen months due to the taxpayer's ina-

bility to obtain shipping space on a water carrier, and during this time the tax was assessed.

The Court sustained the validity of the imposition of the tax on the theory that, while the gasoline was stored in Detroit it could not be said that it constituted an export because the gasoline might have been diverted to domestic markets and, in substance, the facts did not establish, beyond peradventure of doubt, that the gasoline would inevitably and eventually be shipped to Canada. Four Justices dissented from the majority holding in this case. Their dissent proceeded on the assumption that all of the facts indicated that the gasoline in question would, in fact, be exported at a subsequent date; that, therefore, it had at the time of shortage acquired the tax exemption afforded an export; and, hence, the imposition of the tax was improper.

This case too, as has been seen from the above recital, involved a direct tax on an article itself. As such, the problem presented to the Court was a determination of whether the finality date for the tax occurred before the date that the article acquired its status as tax exempt or thereafter. The case establishes no new constitutional doctrine. It is but a logical extension of the decisions of the earlier cases involving direct taxes on exports themselves and a determination on a highly controversial set of facts as to when, in point of time, certain designated articles acquired a tax exempt status.

Neither the *Richfield* case nor these subsequent decisions afford comfort, when considered in the factual aspects of their holdings, to the Appellants *for none of them condemn, under the Import-Export Clause, a tax imposed upon a person other than the owner affording transportation services to articles which, in the geographical sense, will subsequently become exports or previously have been imports.*

None of the decisions have gone this far, nor is any language contained therein, when considered in its context or on the basis of the authorities cited to support it, indicative that the result contended for by the Appellants is the proper one to reach. While it is true that the problem presented by cases arising under the Commerce Clause differs from the problem presented by cases arising under the Import-Export Clause in that in the former a tax may be sustained which ultimately effects interstate or foreign commerce but does not unduly burden it, tax the privilege of engaging in the business or discriminate against it, while in the latter a tax which touches an import or export, itself, is invalid regardless of the extent of the burden, the difference is but a matter of degree. *In each instance, the problem is the scope of the protection; and in solution of the problem, one need find with respect to the Import-Export Clause, only that the tax is on, or substantially on, the import or export while a higher degree of proof is necessary to condemn a tax under the Commerce Clause.*

As has been noted, the Commerce Clause, in affording tax immunity, applies to the process, in the generic sense, of interstate or foreign commerce. The Import-Export Clause, however, is cast, in the words of the Constitution and in the decisions construing it, in terms of articles or transactions and documents so directly connected with the articles as to become a part thereof. The cases decided under the Import-Export Clause demonstrate that not all steps in the transactions involving importing and exporting and all property employed in that activity are tax exempt. Thus, the Import-Export Clause has some limits to its application. That its limits are somewhat short of affording tax immunity to the activities performed by the Appellants, it is submitted, is the only conclusion which can be reached by careful analysis and consideration of all authorities.

There are many other analogous situations in which this Court has held valid taxes whose incidence was indirect or oblique in relation to a constitutionally immune object but in which the charge was that they taxed the "process" of doing Federal business or imposed a prohibited direct tax. *Alabama v. King and Boozer*, 314 U. S. 1 (1941) and *Curry v. United States*, 314 U. S. 14 (1941), overruled prior cases which had prohibited taxes on purchases by the United States, even though the incidence of the tax was on the seller and not on the government. It is now the rule that the constitutional immunity of the Federal Government to taxation by the States does not prohibit a tax on the seller of goods to the government even though the government's cost of doing business is thereby increased.

Likewise the absolute immunity of one Sovereign and its functions and activities, from taxation by the other as between the Federal Government and the States is not violated by an income tax on employees. *Graves v. New York*, 306 U. S. 466 (1939); *Helvering v. Gerhardt*, 304 U. S. 405 (1938).

Another line of cases is *Home Insurance Company v. New York*, 134 U. S. 594 (1890); *Flint v. Stone Tracy Co.*, 220 U. S. 107 (1911); and *Educational Films Corp. v. Ward*, 282 U. S. 379 (1931). In the *Stone Tracy* case, the Federal tax was an excise on the doing of business in a corporate capacity equivalent to one percent of the entire net income. It was held that the income on exempt State municipal bonds owned by a corporation could constitutionally be taxed. The Court held that:

> "* * * where a tax is lawfully imposed upon the exercise of privileges within the taxing power of the state or nation, the measure of such tax may be the in-

> come from the property of the corporation, although a part of such income is derived from property in itself non-taxable. The distinction lies between the attempt to tax the property as such and to measure a legitimate tax upon the privileges involved in the use of such property."

In the *Home Insurance Company* case, *supra*, a state statute imposed a corporate franchise tax and reference was made to the capital stock and dividends for the purpose of determining the amount of the tax. A charge was made that this amounted to a tax on United States bonds forming part of the capital of the insurance company. It was held that the value of the United States bonds could be used as a measure of the tax exacted for the privilege of doing a corporate business.

In *Educational Films Corporation, supra*, the same question was involved as in the *Home Insurance* case. The court cited the *Stone Tracy* and *Home Insurance* cases as holding that these cases had reaffirmed

> "* * * the distinction, repeatedly made in earlier decisions, between a tax, invalid because laid directly on government instrumentalities or income derived from them, and an excise which is valid because imposed on corporate franchises, even though the corporate property or income which is the measure of the tax embraces tax exempt securities or their income."

The Court then cited many other analogous holdings. Included are *Peck v. Lowe, supra, Maine v. Grand Trunk, supra.*

There can be little surprise, therefore, that in a case directly considering the problem here presented, the scope of the protection afforded by the Import-Export Clause was directly limited in accordance with the principles set forth

in the cases heretofore cited, *Inter-Island Steam Nav. Co. v. Territory of Hawaii*, 9 cir., 96 F. (2d) 412 (1938).

That case involved the validity of a so-called inspection fee, denominated by the Supreme Court in hearing the case on appeal as a tax, in the amount of one-twentieth of one percent of the gross receipts of public utilities and one-fiftieth of one percent of the par value of the utilities' outstanding stock, to pay the cost of operating the Public Utilities' Commission, established by Act of the Territory of Hawaii. The suit was brought to enforce payment of the tax for the seven year period from 1923 to 1930. During that period, the Utilities Commission had operated at a deficit exceeding $38,000, but if the taxpayer had paid its taxes there would have been over $13,000 in excess receipts over and above the expenses of the Commission.

Among other grounds, the taxpayer, a common carrier by water, resisted payment of the tax on the theory that it infringed the Import-Export Clause since the taxpayer was engaged in the business of transporting exports and imports between ports of the Territory of Hawaii for transshipment to and from foreign countries. The contention was rejected, the Court saying:

> "It is next contended that the fees are an unconstitutional burden on imports and exports. Article 1, section 9, of the Constitution, provides that: 'No Tax or Duty shall be laid on Articles exported from any State.' Article 1, section 10, provides: 'No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws.' Appellant says that these clauses 'forbid not only property taxes but any fees, charges or occupation taxes which in substance and effect burden imports or exports.' See Anglo-Chilean Nitrate Sales Corp. v. Alabama, 288 U. S. 218, 227, 53 S. Ct. 373, 375, 77 L. Ed. 710. Assum-

> ing, without deciding, that the clauses are applicable to a Territory, we think such a rule has no application here. The fees are not laid on the property imported or exported, on the proceeds thereof, or on the privilege of importing or exporting. The fact that appellant must pay a fee based on receipts from transporting articles imported and exported by others, has only an indirect and remote effect, if any on the imports or exports. * * *"

Subsequently, the case was affirmed in the Supreme Court, 305 U. S. 306 (1938). In the Supreme Court, the Import-Export Clause argument was not advanced nor considered.

The Appellant Canton seeks to distinguish the effect of this decision on the theory that the fee constituted no more than a reasonable inspection fee and thus falls within the one exception contained in the Import-Export Clause. As before stated, the Supreme Court did not treat the payments to be made as fees, but rather denominated them as taxes. Moreover, the United States Court of Appeals did not sustain the validity of the tax upon the theory that it constituted a necessary inspection fee. In this connection, it should be stressed that the exception to the Import-Export Clause is phrased in terms or exactions which are "absolutely necessary" for executing inspection laws. Had the carrier in that case paid the amounts exacted by statute, in fact, the amounts collected by the Territorial Government, and particularly the Public Utilities Commission, would have exceeded the expenses of enforcing the law. It is submitted that the Appellant Canton's attempted distinction of this case is without avail.

CONCLUSION

It has been shown, it is submitted, that the validity of the Maryland gross receipts tax, insofar as it applies to that portion of the gross receipts of the Appellants derived from transportation and other related services within the State of Maryland to articles subsequently to be exported or previously imported, is beyond question for the dual reasons that the tax is a valid franchise tax in lieu of other State taxes; and even if considered as a tax directly upon the gross receipts, is not within the scope of the protection afforded by the Import-Export Clause. Accordingly, it is confidently believed that the decree in the consolidated cases appealed from should be affirmed.

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No. 96

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

CANTON RAILROAD COMPANY, *Appellant*

vs.

JOSEPH H. A. ROGAN, OWEN E. HITCHINS AND WILLIAM W. TRAVERS, CONSTITUTING THE STATE TAX COMMISSION OF MARYLAND, *Appellees.*

ON APPEAL FROM THE COURT OF APPEALS OF MARYLAND

REPLY BRIEF OF APPELLANT

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REPLY BRIEF OF APPELLANT

I

In the Court of Appeals, the Contention was Raised that the Maryland Gross Receipts Tax Statute, insofar as the Tax is Measured by Gross Receipts Derived in Foreign Commerce, Contravenes the Commerce Clause, and that Question was Decided.

It is true that the Statement of the Case (R. 17-31), which was the factual statement upon which the appeal of the Canton Railroad was presented to the Court of Appeals, does not specifically say that the tax was assailed

before the State Tax Commission and the Circuit Court No. 2 of Baltimore City as repugnant to the Commerce Clause. Nor does the statement say specifically that the Circuit Court decided that question. But Canton's Petition of Appeal to the Circuit Court expressly alleged that the State Tax Commission erred in not holding that the tax contravened the Commerce Clause, and the fact that the Circuit Court upheld the tax under the Commerce Clause clearly appears from the Circuit Court's opinion (R. 12-17). In the very second paragraph of that opinion (R. 12) appears the holding, "Our Court of Appeals has held that this tax does not violate the Commerce Clause of the Federal Constitution (*Railroad v. State*, 92 Md. 668 (1901))", and this initial holding was the major premise of the Circuit Court's argument that, since the tax did not violate the Commerce Clause, by the same token, it did not violate the Import-Export Clause. The opinion further cites and attempts to distinguish the Commerce Clause cases which were urged upon it, such as *Joseph v. Carter and Weekes Stevedoring Co., Crew-Levick Co. v. Pennsylvania.* And finally, the Circuit Court goes so far as to hold directly that "these railroads do not engage in foreign commerce" (R. 17).

In the Court of Appeals, the Commerce Clause point was not formally assigned as error, for the reason that no Assignment of Errors is required in that Court, but in Canton's brief and argument it assailed the former decision of the Court of Appeals in *Cumberland and Pennsylvania Railroad Co. v. State*, 92 Md. 668, that the tax was valid under the Commerce Clause. And, in the Court of Appeals, as its opinion shows, both sides in argument cited and relied upon Commerce Clause cases, and, here again, the very cornerstone and basis of that Court's holding that the tax did not offend the Import-Export Clause was its preliminary holding that the tax was valid under the Commerce Clause. The pith of the Court of Appeals' decision is contained in the very last sentence

thereof (R. 44) in which it says, "On principle we see no reason why the franchise tax measured by gross receipts, including receipts from foreign commerce, should be valid under one clause (Commerce Clause) and not under the other (Import-Export Clause), particularly where the tax is in lieu of other permitted taxes."

Surely, we must be permitted to assign as error in this Court an erroneous holding by the Court of Appeals which constituted *a necessary step* in arriving at its further erroneous conclusion that the tax was valid under the Import-Export Clause. Thus, on this point, our case differs completely from *White River Lumber Company v. Arkansas*, 279 U. S. 692, in which the statute was challenged in the State Courts solely on the ground that it denied equal protection on its face, and where, for the first time in this Court, the involved factual point was sought to be made that the statute, as it was administered in practice, denied equal protection. Our case also differs completely from *Thomas v. Iowa*, 209 U. S. 258; *Hiawassee River Power Company v. Carolina-Tennessee Power Company*, 252 U. S. 341; and *Whitney v. California*, 274 U. S. 357, in which the record and the opinions below showed that no Federal question whatever had been raised in the State Courts.

Appellees claim (Brief p. 5) that "The dissenting Judges of the Maryland Court of Appeals, moreover, found that the record before them did not present any contention founded upon the Commerce Clause (Canton R. 50)". The statement of the dissenting judges to which we are referred is to the direct contrary. They said (R. 50):

> "Under the Commerce Clause, since the recent cases and perhaps before, it may be that the Maryland gross receipts tax is constitutional as an 'in lieu' tax. *Canton*, but not Western Maryland, *disputes this proposition* on the facts, but the fact question, I think, is not adequately presented on the record". (Italics supplied.)

The dissent shows affirmatively that the Commerce

Clause point was disputed. The dissent is in error, we submit, in failing to find factual support for condemnation of the tax under that Clause *as an "in lieu" tax*. The Record clearly showed (1) that the "in lieu" tax was on the privilege of engaging in foreign commerce, and (2) that it was not a "just equivalent" for, but ten times greater than, ordinary property taxes for which it was substituted (R. 22).

II

The Maryland Statutes of 1945 and 1947 were Conditional Statutes, which never became Operative, have Expired by their Terms, and, if Effective, would be Discriminatory and Unconstitutional.

Appellees, on pages 15 and 16 of their brief, and the Court of Appeals (R. 39), relied on Laws of Maryland 1945 Chapter 965, and Laws of Maryland 1947, Chapter 677, in an attempt to show that the Maryland Gross Receipts Tax here challenged is, in amount, no more than a "just equivalent of ordinary *ad valorem* property taxes" for State purposes. Such an argument is misleading in the extreme. Both these statutes were temporary in nature and the conditional property taxes with which they were concerned have never been imposed. Both statutory provisions have expired by their terms. They were codified as Sections 7(15), 25(h), 94½ and 95 of Article 81 of the 1947 Supplement of the Maryland Code, solely through error of the codifier. *These statutes are mere threats.* The enormous taxes conditionally stipulated in these statutes would not be "ordinary taxes". They would be extraordinary taxes. Since they never became effective, their validity has never been challenged. Of course, if they became effective, they would be highly discriminatory and would be unconstitutional and invalid under the Due Process Clause of the Fourteenth Amendment, as well as under the Commerce Clause and the Import-Export Clause.

Reliance upon the untried and questionable tentative statutes is an attempt by Appellees to pull themselves up by their bootstraps.

The record shows (R. 21) that the gross receipts tax which Appellant pays annually is, in amount, over ten times greater than the ordinary *ad valorem* property tax for State purposes, which it would pay under existing law, if it were not subject to the gross receipts tax.

No one can validly argue that the gross receipts tax is no more than "a just equivalent" of ordinary non-discriminatory *ad valorem* State property taxes for which it is the substitute.

The tax assailed cannot be sustained under the Import-Export Clause as an "in lieu" tax, because "any" tax, in lieu or otherwise, is forbidden by that clause. It cannot be sustained under the Commerce Clause, because (1) it is a privilege tax on the privilege of engaging in foreign commerce, and (2) it yields far more than a "just equivalent" of ordinary property taxes.

III

Appellant was Engaged in the Importing and Exporting Process as that Term has been used in Cases Applying the Import-Export Clause

Appellees assert that the terms "exporting process" and "importing process", as used by this Court in condemning state taxes upon such processes, are "words of art" with special meaning. They say (p. 38) that "the term 'process' is used as a word of art to mean those transactions, in the case of exports, which begin at dock side". They imply that "importing process" means only those activities in relation to imports which take place before the goods arrive from abroad at the dock in this country. Hence, Appellees argue that these immune processes cannot include Canton's activities in handling and forwarding imports and exports at, and to and from, the docks within the State of Maryland.

The *answer* to, and *refutation* of, this argument is supplied by the holdings in *Brown v. Maryland*, 12 Wheat. (U. S.) 419 and *Cook v. Pennsylvania*, 97 U. S. 566 as to imports, and in *Fairbank v. U. S.*, 181 U. S. 283 and *Crew-*

Levick Co. v. Pennsylvania, 245 U. S. 292 as to exports.

In *Brown v. Maryland*, the State of Maryland made the very same argument but it was rejected by Chief Justice Marshall. Now, one hundred and twenty-three years later the same State still persists in the error.

In the *Cook* case, the auctioneer's services in selling, within the State of Pennsylvania, imports still in original packages were performed after the goods had left the dock side, but they were nevertheless held to be part of the importing process and the auctioneer was held to be immune from a state franchise or license tax sought to be imposed upon the privilege of performing these services.

In the *Fairbank* case, the activities of the initial railroad carrier performed in Minnesota, i.e. entering into a contract of affreightment there by issuing a bill of lading, were held to be part of the exporting process and immune under the Export Clause from a Federal privilege tax, although these services were performed hundreds of miles from the dock side.

In the *Crew-Levick* case, the exporter's activities were performed within the City of Philadelphia and not at or beyond the dock side, but they were nevertheless held immune from a state franchise or license tax sought to be imposed upon the privilege of engaging in such activities.

This Court in *Joy Oil Co. v. State Tax Commission*, 337 U. S. 286, 288, had no hesitation in saying that, by the initial inland shipment of the gasoline from Grand Rapids to Detroit, "one step in the *process* of exportation had been taken".

IV

Appellant Admittedly Handled and Forwarded Imports and Exports, and not Freight Previously Imported or to be Exported.

In their Brief, pages 6, 52, Appellees assert that Canton's services were rendered upon articles "previously imported" and "to be exported". Knowing that this statement cannot be maintained *in the legal sense*, they qualify

it (p. 6) by the irrelevant phrase "in the geographical sense". Hence, they argue that, on the authority of cases like *Cornell v. Coyne*, 192 U. S. 418 (upholding a tax upon manufactured cheese intended to be exported but still in the hands of the manufacturer), the tax upon Canton's activities in forwarding exports is valid. And they argue that the tax upon Canton's activities in handling and forwarding of imports is valid on the authority of cases like *New York v. Wells*, 208 U. S. 14 (upholding a state property tax upon the proceeds of imports sold, which proceeds the importer had not remitted at once to the exporter but had mingled with his other working capital—an illustration of a broken original package); and upon cases like *Peck & Co. v. Lowe*, 247 U. S. 165, and *National Paper and Type Co. v. Bowers*, 266 U. S. 373 (upholding net income taxes upon net income derived from gross income, which in turn had been derived in part from the sale of imports and exports, on the theory that the thing taxed "is as far removed from exportation as are articles intended for export before the exportation begins").

The *answer* is that the basis of this argument flies directly in the face of the admitted facts, and of the controlling law, to the effect that the articles when handled and forwarded by Canton were then actually imports and exports. Admittedly, we are not concerned here with articles before they were exported or after their importation had ceased. Appellees state (p. 6) that they "accept the statement of the case" in Canton's brief. If so, (and they could not, in view of the stipulation of facts, do otherwise), they accept the statement of facts appearing upon pp. 5 and 6 of Canton's brief.

Hooven & Allison Co. v. Evatt, 324 U. S. 652, which Appellees do not question, directly holds that goods retained their status as imports even in the warehouse of the importer located in Xenia Ohio, until their original packages were broken.

Coe v. Errol, 116 U. S. 517, which Appellees do not question, announces the "true rule" that, as to "goods exported to a foreign country", they become exports when, delivered to the initial inland carrier, they "have started upon such transportation in a continuous route or journey".

For these reasons, the goods shipped in *Fairbank v. U. S.*, 181 U. S. 283, became exports immediately when they were shipped in Minnesota, although, no doubt, Appellees could argue that they were "to be exported in the geographical sense". The participation by this initial carrier in the exporting process which was sought to be taxed was performed wholly within the state of Minnesota. Nevertheless, the tax sought to be exacted from the initial railroad carrier in Minnesota for the privilege of entering into the contract of affreightment within that state was held invalid as a tax on exports.

Again, *Cook v. Pennsylvania*, 97 U. S. 566, struck down a franchise or license tax imposed upon a Pennsylvania auctioneer for the privilege of selling at auction imported goods still in their original packages, the auctioneer's activities being part of the importing process, although performed solely within the State of Pennsylvania after the ocean carriage had been completed.

The above argument of Appellees simply cannot stand with *Coe v. Errol*, *Hooven & Allison v. Evatt*, *Fairbank v. U. S.* and *Cook v. Pennsylvania*.

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